

- (4) relocates the NCG's unconstructed Site-Licensed Spectrum to the former NPSPAC Channels and the 1.9 GHz Band spectrum on an EA market wide Clean 1:1 basis while imposing conditions upon the movement of Non-Nextel EA and Cellular-Architecture Systems licensees' constructed and unconstructed Site-Licensed Spectrum.⁵⁷

In 1993 Congress enacted the Omnibus Budget Reconciliation Act. Included in this legislation was an amendment of Section 332 of the Communications Act of 1934, as amended. Pursuant to this amendment the Commission is required to maintain regulatory parity among cellular, PCS and SMR licensees, all of whom fall under the category of Commercial Mobile Radio Service ("CMRS") providers.⁵⁸ Although Nextel refers to the Commission's statutory requirement to maintain regulatory parity only in terms of the FCC's providing equal regulatory treatment with respect to the cellular and PCS carriers and itself,⁵⁹ Preferred maintains that the FCC's duty to maintain regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners, Southern, Preferred, A.R.C., Inc., AirPeak Communications, LLC, Skitronics, LLC and Airtel Wireless, LLC.⁶⁰ In addition, in two separate statutes Congress has mandated that the FCC promote competition among SMR operators.⁶¹

In the *Fresno Mobile Radio* decision⁶², the D.C. Circuit Court of Appeals found that the Commission could not discriminate among similarly situated EA licensees and the holders of Extended Implementation Authorizations ("EIA") with respect to construction requirements absent articulation of a reasonable basis for the disparity in regulatory treatment.⁶³ Ironically, in the *Fresno Mobile Radio remand* proceeding, Nextel itself filed comments in support of regulatory parity. Nextel specifically requested that the Commission afford wide area 800 MHz SMR licensees using BILT Channels the same flexible construction requirements as those given to other CMRS providers because they provide similar services.⁶⁴ Nextel now argues and the *Report and*

⁵⁷ See Report and Order, at ¶ 163.

⁵⁸ 47 U.S.C. § 332(d)(2). See *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1417 (1994) ("CMRS Second Report and Order") and Preferred March Ex Parte, at pp.16-17 & n. 11-22.

⁵⁹ See, e.g., Nextel Communications, Inc., Supplemental Response, May 7, 2004, at pp. 10, 13, 17-18; Nextel Communications, Inc., Comments, May 6, 2002, at pp. 12-13.

⁶⁰ See Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at p. 5.

⁶¹ 47 U.S.C. § 309 (j)(3)(B) and (4)(C) and 47 U.S.C. § 257. See, e.g., Public Notice, *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, June 15, 2004.

⁶² *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

⁶³ *Id.*, at 970.

⁶⁴ Nextel Communications, Inc., Comments, March 27, 2000, PR Docket No. 93-144, at 1-2, and 5-6.

Order provides that for purposes of 800 MHz rebanding the reverse is true with respect to Non-Nextel EA and Cellular-Architecture Systems licensees other than Southern.

The Consensus Parties' Proposal largely adopted by the FCC sought to differentiate between the Nextel Control Group and the Non-Nextel EA licensees primarily upon the present construction status or architecture of their respective systems.⁶⁵ Recognizing the weakness of the so-called "Cellular Deployment Test," the FCC apparently sought to address Nextel's opposition to relocating Non-Nextel EA and Cellular-Architecture System licensees EA- and qualifying Site-Licensed Spectrum.⁶⁶ However, absent articulation of a reasonable basis for:

- (1) excluding the Non-Nextel EA and Cellular-Architecture System licensees' (other than perhaps AirPeak Communications, LLC and Airtel Wireless, LLC) EA- and qualifying Site-Licensed Spectrum from relocating to the former NPSPAC Channels as replacement spectrum;⁶⁷
- (2) excluding the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum from relocating to the 1.9 GHz Band spectrum as replacement spectrum;⁶⁸
- (3) conditioning the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and Site-Licensed Spectrum to the Cellular Block upon their acceptance of reduction of their respective Total, and in many EA markets, Clean and Cellular-Service Eligible Spectrum while increasing considerably the NCG's Clean and Cellular-Service Eligible Spectrum; and
- (4) imposing conditions upon the relocation of Non-Nextel EA and Cellular-Architecture System licensees' constructed and unconstructed Site-Licensed Spectrum to the Cellular Block while moving the Nextel Control Group's constructed and unconstructed Site-Licensed Spectrum to the Cellular Block and 1.9 GHz Band spectrum on an EA market Clean and 1:1 basis⁶⁹

⁶⁵ See Preferred March Ex Parte, at pp. 25-26.

⁶⁶ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 5.

⁶⁷ As pointed out by AirPeak Wireless Communications, LLC in a recent *ex parte* presentation, allowing Non-Nextel EA and Cellular-Architecture System licensees to select the channels within the Cellular Block to which their respective EA- Licensed and qualifying Site-Licensed Spectrum would be relocated would require fewer re-tunings, less time and less expense than the approach advocated by Nextel and adopted in the *Report and Order* by the FCC. See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁶⁸ See n. 14 *supra*.

⁶⁹ Arguably, by imposing the *pro rata* distribution approach and relocating the NCG's constructed and unconstructed Site-Licensed Spectrum on an EA market Clean and 1:1 basis, the FCC is forcibly confiscating the Non-Nextel EA and Cellular-Architecture System licensees' Total and, in many EA markets, Clean and Cellular-Service Eligible Spectrum and transferring them to the NCG. For a detailed discussion of this point, see

a reviewing court necessarily would reach the same result as the *Fresno Mobile Radio* decision, namely that the Commission's discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees was arbitrary and capricious in violation of Section 5 of the Administrative Procedure Act.⁷⁰

Moreover, as noted above, Congress has addressed the precise questions at issue.⁷¹ As the FCC notes in the *Report and Order*, Section 316 of the Communications Act grants the FCC broad authority to modify already existing licenses.⁷² However, such broad authority clearly is circumscribed by the statutory mandates enacted by Congress requiring the FCC to exercise such modification authority so as to maintain regulatory parity among cellular, PCS and SMR licensees and among SMR licensees as a single class and promote competition among such licensees. Given the *Report and Order's* violation of these statutory mandates, a reviewing court necessarily would disallow the FCC's exercise of its modification authority.

Finally, as noted by Southern, the Commission cannot make any lawful distinctions between the Nextel Control Group and the Non-Nextel EA and Cellular-Architecture System licensees with respect to the relocation of their respective EA- and Site-Licensed Spectrum within the PLMRB.⁷³ Neither Nextel's promise to contribute funds to pay the total 800 MHz band relocation costs and its pro rata share of the UTAM relocation and all of the BAS licensee relocation costs in the 1.9 GHz Band spectrum nor its interference with public safety and other licensees' systems in the PLMRB can justify the Report and Order's different treatment. As Southern pointed out, Nextel Partners, which is not promising to pay \$1 toward 800 MHz or other relocation costs and causes little, if any, interference with public safety and other licensees' systems in the 800 MHz Band, is afforded the same favorable treatment as Nextel.⁷⁴

Appendix I attached hereto. For a discussion of the Consensus Parties Proposal's attempt to affect the same result, see Preferred March Ex Parte, at pp. 27-29.

⁷⁰ 5 U.S.C. § 706(2)(A). See *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389 (D.C. Cir. 1995). Such disparate treatment involving the Non-Nextel EA and Cellular-Architecture System licensees' loss of spectrum rights and the failure by the Commission to articulate a reasonable basis therefor violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment's Due Process Clause prohibits arbitrary discrimination by the federal government); Appendix I attached hereto; Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at p. 11; and *Fishman*, at pp. 11-13.

⁷¹ See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

⁷² See *Report and Order*, at ¶¶ 12, 65-74.

⁷³ Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at pp. 11-15.

⁷⁴ *Id.*, at pp. 13-16. See also *Report and Order*, at ¶ 325 & n. 743.

C. Nextel's and Others' Requests for Clarification

In *ex parte* presentations filed in September 2004, Nextel requested the following "clarifications" to the *Report and Order* with respect to its relocation of licenses within the PLMRB. First, Nextel contends that SMR, BILT and Public Safety licensees should not be moved from Channels 121-150 with the General Category Channels are unnecessary to carry out the Commission's reorganization of the PLMRB, would disrupt incumbents without countervailing public interest benefits and not result in additional spectrum becoming available for use by public safety licensees.⁷⁵ Interestingly enough, the Commission determined to relocate SMR, BILT and Public Safety Site licenses from Channels 121-150 to provide Public Safety licensees nationwide access to thirty (30) channels or 1.5 MHz of spectrum.⁷⁶

As noted above, Preferred's Improvements relocated SMR, BILT and Public Safety Site licenses from Channels 121-150 to the Interleave Channels presently held and to be vacated by the Nextel Control Group on a matching geographic "footprint" basis.⁷⁷ Preferred continues to support this position and maintains that such allocation would provide Public Safety licensees with needed additional spectrum to develop interoperability. Preferred therefore opposes Nextel's request for "clarification" or the relocation of SMR, BILT and Public Safety Site licenses within Channels 121-150.

Nextel also requested "clarification" that incumbent Non-ESMR EA licensees' EA- and Site-Licensed Spectrum on Channels 1-120 (other than Nextel and Southern) would be retuned to comparable channels below 861.4 MHz, i.e., they will receive comparable channel availability and interference protection from high-density cellular operators.⁷⁸ Nextel's suggested "clarification" is a recitation of the Consensus Parties' Proposal as enhanced by Nextel in certain of its June 2004 Ex Parte filings.⁷⁹ Preferred already has addressed the legal, practical and mathematical problems resulting from such impermissible discriminatory treatment at length above and in its Ex Parte Presentations

⁷⁵ Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p.2; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 6.

⁷⁶ See Report and Order, at ¶ 153.

⁷⁷ See Preferred March Ex Parte, at p. 45.

⁷⁸ See Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 2; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 6.

⁷⁹ See Nextel Communications, Inc., Ex Parte Presentation, June 4, 2004; Nextel Communications, Inc., Ex Parte Presentation, June 8, 2004, at pp. 6-8; Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at pp. 4-7.

filed on March 2, 2004 and April 23, 2004.⁸⁰ For the sake of brevity, Preferred hereby incorporates these Ex Parte Presentations and their Exhibits by reference.⁸¹

Nextel's "clarification" seeks to revive the discredited Cellular Deployment Test that the Consensus Parties' Proposal employed to (1) separate the EA- and Site-Licensed Spectrum of the Nextel Control Group and Non-Nextel Control Group EA licensees and (2) move only the NCG's (and, to a limited extent, Southern's) EA- and Site-Licensed Spectrum to the Cellular Block on an EA market wide, Clean and 1:1 basis. Instead of limiting the movement of Non-Nextel EA licensees' EA- and Site-Licensed Spectrum into the new Cellular Block to their geographical "footprint" as proposed by the Consensus Parties, in its Ex Parte Presentation filed on September 16, 2004 Nextel reaffirms the position it adopted in its June Ex Parte Presentations that such movement should be limited to the number of the Non-Nextel EA licensees' Clean or MHz/Pops Equivalent Channels. Nextel thus advocates that the winners of FCC Auction #34, such as Preferred, should lose Total Channels in its EA markets while the losers of such Auction in those EA markets such Nextel or Nextel Partners would gain a considerable number of Total, Clean and Cellular-Service Eligible Spectrum. Under Nextel's proposed "clarification," the Non-Nextel EA licensees holding General Category EA-Licensed Spectrum effectively would be forced to transfer both spectrum (Total Channels) and spectrum rights⁸² to the Nextel Control Group and, unlike the members of such Group, not receive value-for-value for such contribution.⁸³ Preferred maintains that the constitutional and statutory infirmities of the Consensus Parties Proposal's impermissible discriminatory treatment of Non-Nextel EA licensees apply to Nextel's proposed "clarification."⁸⁴ For all of the reasons set forth above, Preferred opposes Nextel's proposed clarification.

On October 8, 2004, Southern filed an *ex parte* presentation seeking a clarification that the restrictions associated with the Expansion Band in the Atlanta, Georgia EA market (812.5-813.5 MHz/857.5-858.5 MHz) are inapplicable due to the considerable number of Non-Nextel and Non-Southern SMR, BILT and Public Safety Site licenses that would be relocated to the Interleave Channels in this EA market.⁸⁵ Preferred maintains that Southern's filing reinforces the practical and even mathematical difficulties encountered by the *Report and Order* set forth above. Moreover, Southern's filing ignores the fifty-four (54) Non-Nextel Site licenses in the Upper 200 Channels in

⁸⁰ See Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at pp. 23-29; & 41-45; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 3-7. See also Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at pp. 11-16.

⁸¹ For Nextel Communications, Inc.'s responses to Preferred's criticism of the Consensus Parties Proposal's impermissible discriminatory treatment of Non-Nextel EA licensees, see Nextel Communications, Inc., Ex Parte Presentation, March 19, 2004.

⁸² See 47 C.F.R. § 90.683; and Preferred March Ex Parte, at pp. 25-27, 29-35 and 41-43.

⁸³ See *Report and Order*, at ¶¶ 5, 12, 31-34, 85, 213-216 and 278-324.

⁸⁴ See Preferred March Ex Parte, at pp. 41-43.

⁸⁵ See Southern Communications Services, Inc., Ex Parte Presentation, October 8, 2004.

the Atlanta, Georgia EA market that also arguably should be relocated to the Interleave Channels.⁸⁶ A review of the FCC's license database as of June 30, 2004, confirms Southern's analysis.⁸⁷ Preferred therefore supports Southern's proposed clarification to the *Report and Order*.

On September 23, 2004, AirPeak Communications, LLC filed an *ex parte* presentation seeking clarification that it may elect to relocate its EA- and qualifying Site-Licensed Spectrum to the former NPSPAC Channels (821-824 MHz/866-869 MHz) within the new Cellular Block since such election would not:

- (1) increase the cost of retuning their systems;
- (2) delay the retuning process; and
- (3) not adversely impact the ongoing operations of either Nextel or public safety entities.⁸⁸

As discussed above, the *Report and Order*'s movement methodology fails on practical and even mathematical grounds due to the considerable number of Non-Nextel SMR, BILT and Public Safety Site licenses that need to be relocated from Channels 1-150 and, if the *Report and Order*'s rationale for rebanding is to be applied consistently, such licenses in Channels 401-600,⁸⁹ to the Interleave Channels.⁹⁰ Moreover, if the Transition Administrator and the Commission choose not to relocate Non-Nextel SMR, BILT and Public Safety licenses from the Upper 200 Channels, in forty (40) EA markets in which 64.28 million persons reside, Nextel or Nextel Partners lack sufficient Clean Upper 200 Channels Spectrum to accommodate the relocation of Non-Nextel EA and Cellular-Architecture System licensees absent application of the pro rata distribution approach.⁹¹ Preferred therefore supports AirPeak Communications, LLC's proposed clarification.

Preferred would expand AirPeak Communications, LLC's proposed clarification. As discussed below, Preferred maintains that all Non-Nextel EA and Cellular-Architecture System licensees should be afforded a second election to move their respective EA- and qualifying Site-Licensed Spectrum to either the

- (1) former NPSPAC Channels; or
- (2) Upper 200 Channels

⁸⁶ See n. 9 *supra*.

⁸⁷ See Non-Nextel SMR, BILT and Public Safety Licenses in Channels 1-150 and Channels 401-600 attached hereto as **Schedule 2** to the *CTO Report*.

⁸⁸ See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁸⁹ See n. 9 *supra*.

⁹⁰ See n. 85 *supra*.

⁹¹ See Nextel Control Group Clean Spectrum Holdings In Channels 401-600 attached as **Schedule 3** to the *CTO Report*.

within the new Cellular Block on an EA market Clean and 1:1 basis.⁹²

Such approach generally would require fewer re-tunings, less time and less expense than the approach advocated by Nextel and adopted by the FCC in the *Report and Order*.⁹³ As noted by AirPeak Communications, LLC, moving the General Category EA-Licensed Spectrum of Non-Nextel EA licensees to the former NPSPAC Channels will minimize the costs Nextel and Nextel Partners will incur in modifying their respective networks.⁹⁴

D. Preferred's Improvements

In March 2004, Preferred proposed certain modifications to the Consensus Parties' Proposal.⁹⁵ Unlike the Consensus Parties' Proposal or the approach adopted by the Commission in the *Report and Order*, Preferred's rebanding approach maintains the spectrum and spectrum rights of all Non-Nextel EA and Cellular-Architecture System licensees.

As noted above, with respect to General Category EA-Licensed Spectrum, a Non-Nextel EA licensee would have a second election with respect to the Channels within the new Cellular Block to which its Channels would be relocated.

With respect to Lower 80 EA-Licensed Spectrum, a Non-Nextel EA licensee would have a second election pursuant to which its Channels would be relocated either to the

- (1) Upper 200 Channels beginning with Channel 600 and moving downward; or

⁹² If a Non-Nextel EA or Cellular-Architecture System licensee were to choose the first prong of such election, Channels 1-30 of its General Category EA Authorizations would be retuned to Channels 571-600 in the Upper 200 Channels, if held by Nextel or Nextel Partners in a particular EA market and thus available to be vacated and Channels 31-150 of its General Category EA Authorizations would be retuned to Channels 601-720 (as calculated on a 25 kHz bandwidth basis) in the former NPSPAC Channels, on an EA market wide Clean 1:1 basis. If, as in the Puerto Rico EA market, Channels 576-600 in the Upper 200 Channels were not held by Nextel or Nextel Partners and therefore were unavailable, the Non-Nextel EA licensee's Channels 1-30 if its General Category EA Authorizations would be relocated to the 1.9 GHz Band spectrum in that EA market on an EA market Clean and 1:1 basis.

⁹³ See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁹⁴ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 5 & n. 17; Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 2; and Nextel Communications, Inc. Ex Parte Presentation, September 21, 2004, at Slide entitled "'Nextel's Retuning Costs.'"

⁹⁵ See Preferred March Ex Parte, at p. 45.

(2) 1.9 GHz Band spectrum

on an EA market Clean and 1:1 basis.

With respect to Site-Licensed Spectrum held by either a Non-Nextel EA or Cellular-Architecture System licensee, Preferred maintains that such licensee should be afforded an election to move its Site Channels to the Cellular Block on an EA market Clean and 1:1 basis if it constructs such Channels as part of a Cellular-Architecture System by the construction deadline afforded Nextel and Nextel Partners for their respective unconstructed Site-Licensed Spectrum.⁹⁶ No justification was provided by the FCC in the *Report and Order* for its discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees' Site-Licensed Spectrum. Preferred maintains that no lawful distinctions can be made by the Commission between the Site-Licensed Spectrum held by the NCG and Non-Nextel EA and Cellular-Architecture System licensees justifying different treatment for purposes of 800 MHz rebanding.

II. Allocation of 1.9 GHz Band Spectrum

A. *Report and Order*

The FCC rejected the Consensus Parties Proposal's exclusive allocation to Nextel of a nationwide 10 MHz license in the 1.9 GHz Band in exchange for its vacating a nationwide average of approximately 2.5 MHz in the 800 MHz Band, 4 MHz in the 700 MHz Guard Band and 4 MHz in the 900 MHz Band and its promise to pay up to \$850 million to defray total 800 MHz Band relocation costs since it perceived that such approach provided an insufficient benefit to Public Safety licensees and spectrum of less than comparable value to that of the 1.9 GHz Band spectrum Nextel would be granted.⁹⁷ Instead, the Commission exclusively allocated Nextel 1.9 GHz Band Spectrum on a "value-for-value" exchange basis.⁹⁸

The Commission initially determined that the value of the 1.9 GHz Band spectrum it would award Nextel was \$1.70 per MHz/Pop or \$4.86 billion.⁹⁹ The FCC then determined that the value of the 4.5 MHz of 800 MHz Band spectrum Nextel was vacating¹⁰⁰ was \$1.526 per MHz/Pop.¹⁰¹ Multiplying such figure by the 4.5 MHz of 800 MHz Band spectrum to be vacated and Nextel's 234 million licensed Pops, the Commission determined that the value of such spectrum was \$1.607 billion.¹⁰² The FCC

⁹⁶ See Nextel Partners, Inc., Form 10-K for the period ended December 31, 2003, at pp. 20-21.

⁹⁷ See *Report and Order*, at ¶¶ 32, 212 and 278.

⁹⁸ See *id.*

⁹⁹ See *id.*, at ¶ 297.

¹⁰⁰ See *id.*, at ¶ 307.

¹⁰¹ See *id.*, at ¶ 323.

¹⁰² See *id.*

then added the amount of Nextel's projected \$827 million relocation costs and the \$527 million cost of the UTAM and BAS licensee 1.9 GHz Band spectrum relocation costs.¹⁰³ Unable to determine the probable amount of the total 800 MHz Band relocation costs, the Commission required Nextel to provide a \$2.5 billion irrevocable letter of credit to secure its promise to pay all reasonable 800 MHz Band relocation costs.¹⁰⁴ Finally, to ensure that Nextel would not receive a spectrum "windfall" the FCC imposed an Anti-Windfall payment of the difference between the \$4.86 billion value of the 1.9 GHz Band spectrum Nextel would receive and its costs in reconfiguring the 800 MHz band and clearing the 1.9 GHz Band.¹⁰⁵

A considerable part of the difficulty encountered by the FCC in fitting all of the EA- and Site-Licensed Spectrum held by the Nextel Control Group and Non-Nextel EA licensees into the ESMR portion of the band, which led to its adoption of the *pro rata* distribution approach, is the FCC's separation of 800 MHz rebanding from its exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum by a private sale. The Commission could have based its allocation of such spectrum upon its Section 316 modification authority by moving the General Category and Lower 80 EA- and Site-Licensed Spectrum held by EA licensees and the BILT Channels held by EA licensees that previously had been converted to CMRS according to the type of license held rather than upon the identity of the licensee. The problem with this approach advocated by Preferred and other Non-Nextel EA licensees was that Nextel apparently was unwilling to share 1.9 GHz band spectrum.¹⁰⁶

Instead, the *Report and Order* separates the Nextel Control Group's EA- and Site-Licensed Spectrum from that of Non-Nextel EA and Cellular-architecture System Site licensees. As noted above, it then substitutes a "value-for-value" approach to the exclusive allocation of 10 MHz of 1.9 GHz band spectrum to Nextel for the "kHz-for-kHz" approach advocated by the Consensus Parties' Proposal. The Commission's approach clearly was intended to answer Verizon Wireless' challenge to the FCC's legal authority to award Nextel a nationwide 10 MHz license in the 1.9 GHz band under the Anti-Deficiency Act¹⁰⁷ and Miscellaneous Receipts Act.¹⁰⁸ However, by establishing a \$4.8 billion fair market value "price tag" for the 1.9 GHz band spectrum, the Commission clearly converted a modification of Nextel's 800 MHz Spectrum for which it has authority under Section 316 to a private sale of 1.9 GHz band spectrum clearly

¹⁰³ See *id.*, at ¶¶ 303-304. The BAS licensee relocation costs would be reduced by any MSS-reimbursed expenses incurred prior to the end of the thirty-six (36) month reconfiguration period when offsets will be calculated.

¹⁰⁴ See *id.*, at ¶¶ 182-187, 325 and 329-332.

¹⁰⁵ See *id.*, at ¶¶ 12 and 212.

¹⁰⁶ See Nextel Communications, Inc., Ex Parte Presentation, March 19, 2004, p. 1 & n. 2.

¹⁰⁷ The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B).

¹⁰⁸ The Miscellaneous Receipts Act, 31 U.S.C. § 3302(b).

contravening the mandatorily applicable competitive bidding provisions of Section 309(j).¹⁰⁹

In the *Report and Order* the FCC maintains that Section 309(j) is inapplicable since the award of a nationwide 10 MHz license in the 1.9 GHz band to Nextel does not represent such a major modification of its 800 MHz Interleave and Lower 80 EA and Site Channels to be vacated as to be considered the issuance of an "initial license."¹¹⁰ The Commission then determines that even if Nextel's spectrum rights and responsibilities resulting from the FCC's award of 1.9 GHz band spectrum awarded were so different from those of its 800 MHz band spectrum to be vacated that such award of 1.9 GHz band spectrum should be considered the grant of an initial license, it has the authority under Section 316 to avoid mutual exclusivity when it determines that such avoidance serves the public interest, convenience and necessity.¹¹¹ As support for this position, the FCC cited Section 309(j)(6)(E)¹¹² and the Conference Report concerning the 1997 Balanced Budget Act.¹¹³ According to the FCC, Section 309(j)(6)(E) provides it with broad

¹⁰⁹ Unlike the authorities cited and relied upon by the FCC in determining that it has the Section 316 modification authority to allocate a nationwide 10 MHz license in the 1.9 GHz band, the Commission already has allocated the 1.9 GHz band spectrum for commercial services and indicated the desirability of using this Spectrum for advanced wireless service. See *Report and Order*, at ¶¶ 65-68; Cellular Telecommunications & Internet Association, Ex Parte Presentation, December 4, 2003, p. 12; *Verizon Wireless, White Paper*, at pp. 10-11.

¹¹⁰ See *Report and Order*, at ¶¶ 72-73 and n. 236. The Commission refers to *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) as support for the proposition that it may move licensees on a service-wide basis without license-by-license consideration. See *Report and Order*, at ¶ 65 & n. 214. The FCC would be correct if it had chosen to adopt a movement methodology based upon the type of license held. Instead, in its *Report and Order*, it bases such movement methodology upon the identity of the licensee and impermissibly discriminates between the EA- and Site-Licensed Spectrum held by the Nextel Control Group and that held by the Non-Nextel Control Group EA and Cellular-Architecture System Site Licensees both with respect to movement within the 800 MHz band and the allocation of 1.9 GHz band spectrum. In determining whether such discrimination is justified, a reviewing court necessarily will consider the *Report and Order's* movement of 800 MHz band licenses held by these two groups and its exclusive allocation of 1.9 GHz band spectrum to Nextel on a license-by-license basis.

¹¹¹ See *id.*, at ¶ 73 and n. 237.

¹¹² 47 U.S.C. § 309(j)(6)(E).

¹¹³ H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997); 1997 U.S. Code Cong. & Admin. News, p. 192; see also Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 11962-63 (2000); *DirectTV, Inc. v. FCC*, 100 F.3d 816, 828 (D.C. Cir. 1997); cf. *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605-606 (D.C. 2000). *Contra Verizon Wireless White Paper*, at pp. 15-16.

authority to create or avoid mutual exclusivity in licensing depending upon the Commission's assessment of the public interest.¹¹⁴

The Commission's argument suffers from several factual and legal infirmities. First, the 10 MHz nationwide license in the 1.9 GHz band to be awarded clearly differs in significant ways from the Lower 80 EA and Site Channels and BILT Channels exchanged therefor:

- A nationwide "running" average of 5.5 MHz of the 1.9 GHz band spectrum would represent new and additional spectrum;
- No service rules have been promulgated for the 1.9 GHz band spectrum; FCC likely would follow the service rules promulgated under Part 27 of its Rules which differ from the service rules applicable to Nextel's 800 MHz band spectrum;
- Nextel would be awarded a single nationwide license in exchange for its 800 MHz EA- and Site-Licensed Spectrum in one hundred four (104) EA markets;
- Nextel would be awarded a nationwide license even though it holds no 800 MHz band spectrum in seventy-one (71) EA markets in which 43 million persons live and work;¹¹⁵
- Nextel would be awarded Clean and Contiguous Spectrum even though the nationwide "running" average of 4.5 MHz of 800 MHz band spectrum is largely encumbered by EA Authorizations and Site licenses held by nonaffiliated entities; and
- Nextel would be awarded such Clean and Contiguous Spectrum even though a considerable portion of its 800 MHz band spectrum is Site- Licensed Spectrum with a small grouping of frequencies and limited geographic and population coverage.¹¹⁶

¹¹⁴ See *Report and Order*, at ¶ 73 & n. 237.

¹¹⁵ See Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, **Exhibit F**. Nextel Partners also holds 800 MHz spectrum in several EA markets in which Nextel holds 800 MHz spectrum covering the majority of the total population. Nextel Partners' spectrum in these EA markets covers a total of 10 million Pops. See also Nextel Partners, Inc. Form 10-K for the period ended December 31, 2003, pp. 7-8.

¹¹⁶ Under previous FCC decisions, the conversion of the Nextel Control Group's Site-Licensed Spectrum into a single nationwide 10 MHz PCS license in the 1.9 GHz band is by itself the award of an initial license triggering the competitive bidding requirements of Section 309(j). See *Verizon Wireless White Paper*, at pp. 11-12; see also *Verizon Wireless, LLC*, Ex Parte Presentation, June 10, 2004, p. 7. The award of a nationwide license would be considered an initial license under the Commission's rules since it clearly would be a "major modification." Under such Rules, a licensee' request "to add a frequency or frequency block for which the applicant is not currently authorized" is considered a "major modification." 47 C.F.R. § 1.929(a)(6). The Commission has long regarded such a "major modification" as the equivalent of an "initial license" that is subject to the competitive bidding provisions of Section 309(j) since such changes are "analogous to applications for construction permits for new stations" and because of "the

Second, assuming *arguendo*, as does the Commission, that the award of the 10 MHz nationwide license in the 1.9 GHz band involves the issuance of an initial license,¹¹⁷ the FCC clearly no longer could rely upon its Section 316 modification authority to restrict participation in such spectrum allocation to Nextel. In such event, the Commission could look only to Section 309(j)(6)(E) as authority for its avoiding mutual exclusivity and the competitive bidding provisions of Section 309(j). However, a reading of the legislative history of this section indicates that it was meant to encourage the FCC in certain situations to accommodate all parties seeking access to a particular block of spectrum¹¹⁸ where such an arrangement would better serve the public interest, convenience and necessity. This paragraph was added to Section 309 to address the concerns of companies interested in obtaining MSS or Big LEO authorizations that the new competitive bidding provisions would disrupt the MSS rulemaking proceeding. The paragraph was intended to eliminate their opposition to auctions by its encouragement of the Commission to specifically seek an arrangement to avoid mutually exclusive applications in the MSS or Big LEO proceeding.¹¹⁹

As noted above, the FCC contends that Section 309(j)(6)(E) provides it with broad discretionary authority to avoid mutual exclusivity based upon its determination of the public interest.¹²⁰ However, based upon this section's legislative history, such discretion is limited to determining whether it would better serve the public interest to allocate spectrum to a class of licensees on a *pro rata* or settlement basis or by a public auction.¹²¹ None of the authorities cited by the FCC, including the *MSS L-Band Order*, authorize it to award an initial license to a single entity, particularly where, as here, the

absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner." Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast And Instructional Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15925-26 (1998).

¹¹⁷ See *Verizon Wireless White Paper*, at pp. 11-12 & n. 49. See also *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999).

¹¹⁸ See *id.*, at p. 16; H.R. Rep. No. 103-111, at 258-59 (1993).

¹¹⁹ See *id.*

¹²⁰ See *Report and Order*, at ¶ 73 and n. 236.

¹²¹ See *Verizon Wireless White Paper*, at p. 15; see also Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rulemaking*, IB Docket No. 01-185, 18 FCC Rcd 1962, 2070 at ¶ 225 & n. 591 (2003) ("MSS/ATC Order"); Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band, *Notice of Proposed Rulemaking*, IB Docket No. 96-132, 11 FCC Rcd 11675, 11685, at ¶¶ 23-24 (1996) ("MSS L-Band NPRM"); Report and Order, 17 FCC Rcd 2704 (2002) ("MSS L-Band Order"); Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band for Fixed Service, ET Docket No. 97-99, 12 FCC Rcd 4990 (1997), *recon. denied*, 13 FCC Rcd 15147 (1998) ("DEMS Order").

Commission already has allocated the spectrum in question for advanced commercial service.

The FCC contends that it has the authority to establish threshold qualifications and limit eligibility to apply for a license where it finds that such restricted access serves the public interest, convenience and necessity.¹²² However, most analysts and subsequent court decisions have found that the U.S. Supreme Court's decision in *Storer Broadcasting*,¹²³ the case relied upon by the Commission, authorizes the FCC to do more than establish reasonable licensee qualification standards.¹²⁴ The FCC can establish rules that all licensees may be required to satisfy. It cannot, as it does in the *Report and Order*, establish the licensee by rule.¹²⁵

Finally, the Commission argues that mutual exclusivity does not exist since it has not authorized the filing of applications for this spectrum, has never proposed to do so, and for reasons set forth in the *Report and Order* conclude that it is not in the public interest to open the spectrum for the filing of competitive applications.¹²⁶ However, the FCC cannot avoid its statutory obligation to maintain regulatory parity and promote competition¹²⁷ and allocate licenses for advanced commercial service by a competitive bidding procedure simply by awarding Nextel the 1.9 GHz band spectrum pursuant to a private sale.¹²⁸

Many investment banking firm analysts recognize that an award of 1.9 GHz band spectrum to Nextel would represent a significant spectrum enhancement.¹²⁹ According to some of these analysts, such spectrum award would be a "transforming event" for Nextel allowing it to construct a CDMA-based 3G network for voice and data or a high speed data network using Flarion Technologies, Inc.'s OFDM technology.¹³⁰

¹²² See *Report and Order*, at ¶ 74 & n. 239.

¹²³ *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

¹²⁴ See, e.g., *Committee For Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 459-460 (D.C. Cir. 1991); *Telocator Network of America v. FCC*, 691 F.2d 525 (D.C. Cir. 1982).

¹²⁵ *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995); *Aeronautical Radio, Inc. v. FCC*, 928 F. 2d 428, 460 (D.C. Cir. 1991); *New South Media Corp. v. FCC*, 685 F.2d 708, 709-711, 715-716 (D.C. Cir. 1982).

¹²⁶ See *Report and Order* at ¶ 71.

¹²⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 6002(d) (3) (B), 107 Stat. 397 (1993)(mandating that Commission establish a uniform regulatory regime for all commercial mobile services); 47 U.S.C. § 309(j)(3)(B) & (4)(C); 47 U.S.C. § 257; see *Verizon Wireless White Paper*, at pp. 14-15.

¹²⁸ See *Verizon Wireless White Paper*, at p. 11 & nn. 45-46.

¹²⁹ See *id.*

¹³⁰ See *Nextel Sees Resolution of Spectrum Plan in 70 Days*, Reuters Online article, October 6, 2004 ("Nextel has said in the past that a resolution of interference problems with public safety networks would help it develop plans for high-speed mobile Internet services. Donahue told investors on Wednesday that he expects Nextel to decide by the

Preferred and twenty-seven (27) other licensees share EA-Licensed Spectrum with Nextel or Nextel Partners in one hundred nineteen (119) EA markets. Discriminatory treatment of the Non-Nextel Control Group EA licensees by modifying their EA-Licensed Spectrum differently than that of Nextel's and excluding them from eligibility to (1) file modification applications for such 1.9 GHz band spectrum in certain EA markets and (2) purchase a portion of such Spectrum in these and other EA markets would violate the Commission's statutory obligation to ensure regulatory parity among Nextel, Nextel Partners and the Non-NCG EA licensees.¹³¹ According to Nextel, "[r]egulatory parity is a fundamental requirement established by Congress in the Omnibus Budget Reconciliation Act of 1993 ('1993 Act')."¹³² The 1993 Act created the CMRS regulatory classification and expressly directed the FCC to modify its rules for common carrier and private mobile radio services "establish regulatory symmetry among mobile services."¹³³ In enacting this legislation, Congress' intent was "to create a level regulatory playing field for CMRS."¹³⁴ As the Commission has determined, the "broad goal of this [legislation] is to ensure that economic forces—not disparate regulatory burdens—shape the development of the CMRS marketplace."¹³⁵ According to Nextel the 1993 Act "directed the Commission to ensure that all CMRS licensees, including cellular-like SMR licensees, cellular licensees and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field."¹³⁶ Further, as Nextel has stated, pursuant to the 1993 Act the FCC has auctioned

beginning of next year which technology it will use for such services. He said the company could have a national high-speed network built by the end of 2006. By this time it could deliver media content over its networks and could also partner with cable television operators looking to get into telecommunications.") Although Nextel refers to the FCC's statutory requirement to maintain regulatory parity only in terms of the Commission's providing equal regulatory treatment with respect to the cellular and PCS carriers and itself, such statutory obligation in this context clearly encompasses the class of licensees whose EA- and Site-Licensed Spectrum is to be relocated and thereby modified. *See, e.g.*, Nextel Communications, Inc., Supplemental Response, May 7, 2004, at pp. 10, 13, 17-18; Nextel Communications, Inc., Comments, May 6, 2002, at pp. 12-13; Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at pp. 3 & n. 6, 11-12 & n. 48, and 15-16.

¹³¹ Southern Communication Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 18.

¹³² CMRS Third Report and Order, at ¶ 1.

¹³³ *Id.*, at ¶ 11. *See also* H.R. Rep. No. 103-111 (1993)(1993 Act "directs the Commission to review its rules and regulations to achieve parity among services that are substantially similar. In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services."); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999).

¹³⁴ *Id.*, at ¶ 4.

¹³⁵ Nextel Communications, Inc., Comments, May 6, 2002, at p. 12. *See also*, Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 3 & n. 6.

¹³⁶ *Id.*

geographic area overlay licenses in the 800 MHz Land Mobile Radio Band. In doing so, the Commission expressly stated that such licenses could be used to operate "multiple base station, wide-area 'cellular-type' commercial radio networks in competition with cellular and PCS operators."¹³⁷

Like Nextel and Nextel Partners, Preferred is seeking an allocation of 1.9 GHz band spectrum so that it might increase its spectrum capacity, improve the cost efficiency of the network it will deploy over the next 2-3 years and offer a fixed high-speed broadband wireless service. Holding the same type of licenses as these companies, Preferred is seeking the same opportunity to compete on an equal basis in the marketplace against cellular and PCS operators. Preferred contends that the FCC is required by the statutory mandates to promote regulatory parity and promote diversity of license ownership and competition among commercial SMR licensees and operators to open up participation in the allocation of 1.9 GHz band spectrum to all General Category and Lower 80 EA licenses whose authorizations are being moved and modified.¹³⁸

Preferred maintains that if the FCC uses the EA market boundaries and moves the EA-Licensed Spectrum of Nextel, Nextel Partners and the Non-Nextel EA and Cellular-architecture System Site licensees in the same way based upon the type of license held as contrasted with how a particular licensee presently operates its spectrum or the identity of the licensee it clearly has the Section 316 modification authority to allocate 10 MHz or more of 1.9 GHz band spectrum to the class of licensees including all of the General Category and Lower 80 EA licensees.¹³⁹ Since 5.5-10 MHz or more of the 1.9 GHz band

¹³⁷ See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 7. See also, Southern Communications Services, Inc., Ex parte Presentation, June 23, 2004, at p. 5 ("Regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners, and Southern LINC. Thus, Nextel, Nextel Partners, Southern LINC and other CMRS entities should receive comparable regulatory treatment."); Nextel Communications, Inc., Comments, May 6, 2002, at p. 12 (1993 Act "directed the Commission to ensure that all CMRS licensees, including cellular-like SMR licensees, cellular licensees, and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field.")

¹³⁸ See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 7. See also Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 5 ("Regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners and Southern LINC. Thus, Nextel, Nextel Partners, Southern LINC and other CMRS entities should receive comparable regulatory treatment."); Nextel Communications, Inc., Comments, May 6, 2002, at p. 12 (1993 Act "directed the Commission to ensure that all CMRS licensees, including cellular-like SMR licensees, cellular licensees, and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field.")

¹³⁹ Both Nextel and the FCC apparently recognize that adoption of such an approach would provide it with the legal authority lacked by the Enhanced Consensus Parties' Proposal and the present version of the *Report and Order*. Based upon conversations between certain representatives of A.R.C., Inc. and WTB staff members, the Commission

spectrum to be awarded in one of these EA markets would be replacement spectrum and such award arguably would neither be significantly different from or greater than the spectrum modified that it should be considered the award of an initial license under the *Fresno Mobile Radio* decision, the Commission's rules or the *Competitive Bidding Second Report and Order*. Moreover, Section 309(j)(6)(E) would be applicable since the FCC would be providing a solution that would accommodate the replacement spectrum of all members of the class of licensees affected—the General Category and Lower 80 EA licensees whose authorizations are being moved and modified by the FCC.

In applying Section 309(j)(3)(C)'s directive that the FCC should consider whether the award of a particular license or set of licenses outside the competitive bidding provisions of Section 309(j) would unjustly enrich the licensee, the FCC necessarily compares the value of the replacement spectrum to that vacated or returned. For the reasons discussed above, the *Report and Order* would in many EA markets clearly provide Nextel with spectrum reasonably valued at a much greater amount than its 800 MHz band spectrum to be vacated.¹⁴⁰ In the twenty-eight (28) EA markets in which Nextel holds all of the EA-Licensed Spectrum, the Consensus Parties' Proposal and Nextel's recent modification would grant it a geographical portion of nationwide 10 MHz as replacement spectrum.

However, in the seventy-one (71) EA markets in which Nextel holds no 800 MHz band spectrum and in the one hundred eighteen (118) such markets in which Nextel Partners (42 EA markets) or it (78 EA markets) shares EA-Licensed Spectrum with Non-Nextel Control Group EA licensees, the Commission's award of a geographic portion of a 10 MHz nationwide license in the 1.9 GHz band clearly would provide Nextel with spectrum far more valuable than the 800 MHz spectrum it would surrender. In seventy-one (71) of these markets, Nextel holds no 800 MHz band spectrum to be exchanged. To equalize the value of the spectrum to be exchanged, Nextel would be required to pay the

intends to allocate 1.9 GHz band spectrum in each of the 175 EA markets as replacement spectrum for the already existing 800 MHz band spectrum to be vacated in those EA markets by either Nextel or Nextel Partners. Nextel Partners, Inc. would be allocated 1.9 GHz band spectrum in the seventy-one (71) EA markets in which it, rather than Nextel, holds 800 MHz band spectrum in excess of such replacement spectrum for its agreement to pay its own relocation costs. Such approach would buttress the Commission's contention that the award of 1.9 GHz band spectrum would not involve the issuance of "initial" licenses triggering the otherwise mandatorily applicable competitive bidding provisions of Section 309(j) and thus minimize the litigation risk posed by the anticipated legal challenge from Verizon Wireless. However, unless such approach also includes the Non-Nextel Control Group EA licensees, it necessarily will violate the Commission's statutory mandates to maintain regulatory parity and promote competition. *See Report and Order*, at ¶¶ 325 & n. 743, 326, 345, 347, 353 and 357. *Contra, Report and Order*, at ¶¶ 12 and 34. *See also* Preferred Communication Systems, Inc., March Ex Parte, March 2, 2004, at pp. 49-50; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-7.

¹⁴⁰ *See Verizon Wireless White Paper*, at p. 11 & nn. 45-46.

"full" fair market value of the 1.9 GHz band spectrum, the amount the Commission reasonably could be received if it conducted a competitive auction. In certain of the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum, the Consensus Parties' Proposal also would provide Nextel with 1.9 GHz band spectrum far more valuable than the 800 MHz band spectrum Nextel would surrender. To equalize the value of the spectrum to be exchanged, Nextel would be required to pay the "full" fair market value of the 1.9 GHz band spectrum. Of course, the problem with increasing the cash component in the EA markets in which Nextel lacks 800 MHz band spectrum or Nextel Partners or it shares EA-Licensed Spectrum with Non-NCG EA licensees is that it converts such spectrum modification into a private sale of 1.9 GHz band spectrum in these EA markets clearly triggering the competitive bidding provisions of Section 309(j).

Under Preferred's Improvements all General Category and Lower 80 EA licensees would receive replacement spectrum on a Clean 1:1 basis for their encumbered EA-Licensed Spectrum. As discussed above, such licensees' Site-Licensed Spectrum would be exchanged for EA market-wide frequencies on a MHz/Pops Equivalent basis. Given the amount of CMRS Cellular Service Eligible Spectrum moving and modified under all of the Rebanding Proposals presently under consideration by the FCC, a minimum of 5.5 MHz of 1.9 GHz band spectrum is needed to replace already-existing 800 MHz band spectrum. While such 1.9 GHz spectrum may be more valuable than the encumbered 800 MHz band spectrum it would replace, it would not appear that such increase would be as great as that afforded MSS licensees by the Commission in the *MSS/ATC Order*.

Moreover, unlike previous proceedings involving the relocation of fixed microwave or MSS licensees to clear spectrum for its reallocation to commercial service, here SMR EA- and Site-licensees would be relocating their existing systems to replacement frequencies for the benefit of public safety and other systems presently experiencing interference within the 800 MHz band. Under Preferred's Improvements certain of these EA licensees also would elect to forego reimbursement of their own relocation costs and contribute funds toward the total 800 MHz band relocation costs. These EA licensees would be afforded the opportunity to purchase 1.9 GHz spectrum in a particular EA market in excess of that needed to replace already-existing 800 MHz band spectrum. Given the above facts and the Commission's need to provide an incentive to EA licensees to pay at least a portion of the total 800 MHz band relocation costs, the FCC should determine that award of 1.9 GHz band spectrum licenses under Preferred's Improvements would not unjustly enrich the EA licensees in violation of Section 309(j)(3)(C)'s directive.

Unlike the Consensus Parties' Proposal, under Preferred's Improvements all General Category and Lower 80 EA licensees as a class would contribute more spectrally and financially than they would receive from an allocation of 1.9 GHz Band spectrum. As discussed above, such EA licensees would vacate an average of 13-13.5 MHz of 800 MHz band spectrum. 6 MHz of such spectrum would be replaced on a Clean 1:1 basis by 6 MHz in the new Cellular Block comprised of the former NPSPAC Channels. An

average of 7-7.5 MHz of such spectrum would be replaced on a Clean 1:1 basis by 7-7.5 MHz in the 1.9 GHz band.

Recognizing that (1) additional 1.9 GHz band spectrum is necessary to be allocated as replacement spectrum for already-existing 800 MHz band spectrum that is being moved and modified and (2) practically neither Nextel (and Nextel Partners) nor Non-Nextel EA and Cellular-Architecture System licensees can be expected to contribute considerable funds to defray total 800 MHz relocation costs unless they receive a significant spectrum benefit, under Preferred's Improvements the Commission would increase the allocation of 1.9 GHz band spectrum from 10 MHz (1,910-1,915 MHz/1,990-1,995 MHz) to 12.5 MHz (1,910-1916.25 MHz/1,990-1996.25 MHz). As discussed above, such additional allocation of 1.9 GHz band spectrum is practically and mathematically necessary to accommodate the reorganization of the PLMRB set forth in the *Report and Order* and to maintain the spectrum rights of Non-Nextel EA, Cellular-Architecture System and SMR Site licensees.

At \$1.526 per MHz/Pop¹⁴¹ the value of the 8.55 MHz of such spectrum to be vacated by the General Category and Lower 80 EA licensees as a class of licensees would have a value of \$3.809 billion.¹⁴² In addition, Nextel, Preferred and other such EA licensees would forego a minimum of \$847 million in reimbursement of their own relocation costs and contribute up to \$1 billion to defray total 800 MHz band relocation costs and \$527 million in UTAM and BAS licensee relocation costs. The total spectral and financial contributions by all of the General Category and Lower 80 EA licensees as a class of licensees therefore would be \$6.183 billion.

As noted above, the FCC calculated that the value of such 1.9 GHz band spectrum to be received would be \$1.70 per MHz/Pop or \$4.860 billion.¹⁴³ The General Category

¹⁴¹ This is the figure used by the Commission in the *Report and Order* for the 800 MHz Band spectrum to be vacated by Nextel. The total contribution by Nextel, Nextel Partners and the Non-Nextel Control Group EA licensees under Preferred's Improvements would be \$6.163 billion. Assuming that the value of the 1.9 GHz band spectrum is the \$1.70 per MHz/Pop figure determined by the Commission in the *Report and Order*, these licensees therefore would contribute \$1.199 billion more in spectral and financial contributions than they would receive in exchange therefor. See *Report and Order*, at ¶¶ 35, 297 and 323.

¹⁴² The Non-Nextel Control Group EA licensees hold a nationwide average of forty (40) Channels, or 2 MHz of General Category and Lower 80 EA-Licensed Spectrum that would move and need to be replaced on a Clean 1:1 basis in the new Cellular Block. Assuming that such licensees' Site-Licensed Spectrum (including the B/ILT Channels held by Southern) also move into the new Cellular Block, the average spectrum figure and value would increase accordingly.

¹⁴³ Using the \$1.70 per MHz/Pop valuation figure determined by the FCC in the *Report and Order*, under Preferred's Improvements this amount would be \$6.0775 billion (286 million Pops multiplied by 12.5 MHz of 1.9 GHz band spectrum multiplied by \$1.70 per MHz/Pop). Nextel, Nextel Partners and the Non-Nextel Control Group EA licensees

and Lower 80 EA licensees as a class of licensees therefore would contribute \$1.323 billion more in spectral and financial contributions than they would receive in exchange therefor. Under Preferred's Improvements the General Category and Lower 80 EA licensees *therefore clearly could not be considered to have received an undue benefit or be unjustly enriched in violation of Section 309(j)(3)(C).*

B. Nextel's Request for Clarification

In an *ex parte* presentation filed on September 21, 2004, Nextel requested that the Commission clarify the *Report and Order* with respect to its calculation of the value of Nextel's spectral contribution.¹⁴⁴ Although not entirely clear from its *ex parte* presentation, Nextel apparently is seeking credit for the value of the 800 MHz Band spectrum to be vacated by Nextel Partners, Inc.¹⁴⁵ Preferred maintains that Nextel's request confirms the legal infirmity of the *Report and Order*'s exclusive allocation of 1.9 GHz Band spectrum to Nextel. If the Commission allocates the 1.9 GHz Band spectrum to Nextel in the seventy-one (71) EA markets in which it holds no 800 MHz Band spectrum, such award of spectrum clearly is pursuant to a private sale rather than a modification of its already existing 800 MHz Band spectrum.¹⁴⁶ On the other hand, if the FCC allocates the 1.9 GHz Band as replacement spectrum for the already-existing 800 MHz Band spectrum held by Nextel or Nextel Partners in the one hundred seventy-five (175) separate EA markets, the Commission would have no basis for denying Non-Nextel EA and Cellular-Architecture System licensees from participating in the award of 1.9 GHz Band spectrum.¹⁴⁷

Preferred therefore supports Nextel's proposed clarification to the *Report and Order* based upon its understanding that the FCC will award the 1.9 GHz Band spectrum on an EA market basis to Nextel, Nextel Partners and Non-Nextel EA and Cellular-Architecture System licensees depending upon which of them holds the 800 MHz Band spectrum to be vacated in a particular EA market.

C. Preferred's Improvements

In its March 2004 *ex parte* filing, Preferred proposed that the Commission explicitly recognize that a minimum of 5.5 MHz of 800 MHz Band EA- and Site-

therefore would receive a benefit of \$409.5 million. Presumably, these licensees would pay such amount to the U.S. Treasury as an anti-spectrum windfall payment.

¹⁴⁴ See Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 9.

¹⁴⁵ See *Report and Order*, at ¶ 325 & n. 743.

¹⁴⁶ See Preferred March Ex Parte, at pp. 4, 37-38 and 41-42.

¹⁴⁷ Preferred has been informed by representatives of A.R.C., Inc. that the Wireless Telecommunications Bureau has adopted the latter position. According to A.R.C.'s representatives the Wireless Telecommunications Bureau's position is based upon the language in footnote 743 in the *Report and Order*.

Licensed Spectrum needed to be moved and exchanged for 1.9 GHz Band spectrum.¹⁴⁸ In the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners share General Category and Lower 80 EA-Licensed Spectrum with Non-Nextel EA licensees, such figure increases from 5.5 MHz to as much as 8-9 MHz. As noted above, under Preferred's Improvements the FCC would modify and move the General Category, Lower 80 EA- and Site-Licensed and BILT Site Channels according to type of license held rather than their construction status, type of system architecture deployed or identity of the licensee. As a result, the FCC clearly has authority under existing precedent to modify and move the 800 MHz licenses of a particular class of licensees to the 1.9 GHz Band on an EA market Clean and 1:1 basis.¹⁴⁹

With respect to the "excess" 1.9 GHz Band spectrum, the 1.9 GHz Band spectrum awarded in the one hundred seventy-five (175) EA markets, under Preferred's Improvements the FCC would sell such spectrum to members of the class of General Category and Lower 80 EA licensees and Cellular-Architecture System licensees that elect to

- (1) forego reimbursement of their own relocation costs; and
- (2) contribute funds toward payment of total 800 MHz Band relocation costs and the clearing of the 1.9 GHz Band spectrum.¹⁵⁰

Preferred maintains that although the award of such spectrum would involve the issuance of an initial license, under existing precedent the FCC would have the authority to avoid mutual exclusivity and the otherwise mandatorily applicable competitive bidding provisions of Section 309(j).¹⁵¹ Such approach clearly would comply with the

¹⁴⁸ See Preferred March Ex Parte, at pp. 7, 37-38 and 49-50.

¹⁴⁹ See *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, MM Docket No. 85-41, Report and Order, RR 2d 1455 (1986) ("Channel Exchange Order") (1988), aff'd *Rainbow Broadcasting v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) ("Rainbow Broadcasting"); *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, IB Docket No. 01-185, 18 FCC Rcd 1962, ¶ 225 & n. 591 ("MSS/ATC Order"); *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band*, IB Docket No. 96-132, Report and Order, 17 FCC Rcd 2704, at ¶ 225 ("MSS L-Band Order"); *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, ET Docket No. 97-99, Order, 12 FCC Rcd 4990 (1997), recon. denied, 13 FCC Rcd 15147 (1998) ("DEMS Order") at ¶ 11.

¹⁵⁰ See Preferred March Ex Parte, at pp. 7 and 49-50.

¹⁵¹ See Sections 316 and 309(j)(6)(E) of the Communications Act of 1934, as amended and the authorities cited in n. 147 *supra*.

Commission's statutory mandates to maintain regulatory parity among SMR licensees and to promote competition among them.¹⁵²

III. Funding

A. *Report and Order*

Under the Consensus Parties' Proposal Nextel promised to contribute up to \$850 million toward payment of total 800 MHz Band relocation costs. Nextel also promised to place \$100 million into an independent escrow account and securing the remaining \$750 million balance of such amount with an irrevocable letter of credit. Seeking to avoid a scenario in which Public Safety and other licensees' Site-Licensed Spectrum were partially relocated and Nextel's estimates of relocation costs proved unrealistically low leaving such licensees without the means of completing the relocation process, the Commission declined to cap Nextel's payment obligation at any amount.¹⁵³ Instead, the FCC required Nextel to pay all 800 MHz Band reconfiguration costs as defined in the *Report and Order*.¹⁵⁴ Moreover, the Commission required Nextel to irrevocably commit a minimum of \$2.5 billion to ensure completion of 800 MHz rebanding.¹⁵⁵

Under the FCC's approach Nextel and/or the issuing bank would select a Letter of Credit Trustee. Such Trustee is required to be independent and free of conflicts of interest. The Trustee would draw upon the Letter of Credit to fund the costs involved in the 800 MHz rebanding process and clearing the 1.9 GHz Band.¹⁵⁶ If, at any time during the 800 MHz rebanding process, the Transition Administrator determines that the Letter of Credit does not retain sufficient undrawn funds to ensure completion of such process, Nextel would be required to open an additional Letter of Credit. However, the Transition Administrator is instructed not to permit Nextel to reduce the aggregate secured by the Letter(s) of Credit below \$850 million.¹⁵⁷

B. Nextel's Requests for Clarification

In its *ex parte* presentation filed on September 21, 2004, Nextel requested a clarification that would allow it to substitute a standby letter of credit for the irrevocable letter of credit required by the Commission in the *Report and Order*.¹⁵⁸ In its *ex parte*

¹⁵² See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-7; and Preferred March Ex Parte, at pp. 49-50.

¹⁵³ See *Report and Order*, at ¶ 29.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*, at ¶ 181.

¹⁵⁶ See *id.*, at ¶ 182.

¹⁵⁷ See *id.*, at ¶ 183.

¹⁵⁸ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 9; see also Nextel Communications, Inc., Ex Parte Presentation, September 23, 2004; and Nextel Communications, Inc., Ex Parte Presentation, October 1, 2004.

presentation filed on September 23, 2004, Nextel requested the following clarifications of the *Report and Order* with respect to its obligation to provide a Letter of Credit:

- (1) provide multiple letters of credit to be issued by a number of financial institutions;
- (2) Nextel be allowed to pay 800 MHz rebanding costs directly as they are incurred during the course of the relocation process; and
- (3) if Nextel determined not to accept the *Report and Order*, it would not be required to perform its obligations set forth therein.¹⁵⁹

Preferred maintains that in reviewing Nextel's requests for clarification the Commission should seek to promote an 800 MHz rebanding payment process involving the least possibility for disputes and resulting delay. Under this standard, Nextel's requests appear reasonable and justifiable. However, if the FCC allows Nextel to pay 800 MHz relocation costs directly, Preferred would request that the Commission explicitly retain the Transition Administrator's role in determining which 800 MHz Band relocation costs are to be paid and in what amounts. Nextel's role under this approach would be to simply forward the payments approved by the Transition Administrator.

In its *ex parte* presentation filed on September 16, 2004, Nextel requested clarification that it receive credit in the financial reconciliation process described in paragraphs 329-330 of the *Report and Order* for the costs it incurs in adding base stations necessary to maintain its existing network capacity during the band reconfiguration process.¹⁶⁰

Preferred believes that Nextel's request for clarification is reasonable and should be adopted. Preferred would note that Nextel inadvertently omitted to request such clarification on behalf of Nextel Partners. Preferred would support extending the credit Nextel would receive for such capital expenditures to those incurred by Nextel Partners. However, Preferred maintains that the Commission's amendment of its rules to allow 900 MHz Band licenses to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use¹⁶¹ and the Transition Administrator's credit of Nextel's and Nextel Partners' capital expenditures incurred in adding base stations to maintain their respective existing operating systems' capacity should obviate the need to impose the *pro rata* distribution approach discussed above and in Appendix I attached hereto.

C. Preferred's Improvements

One of the major legal and practical problems with the CTIA/Verizon Wireless Compromise Proposal was that it required Nextel to pay for 10 MHz of new 2.1 GHz

¹⁵⁹ See *Report and Order*, at ¶ 87.

¹⁶⁰ See Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p.3; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 8.

¹⁶¹ See 47 C.F.R. § 90.621(f) and *Report and Order*, at ¶ 6.

band spectrum when it is purchasing an average of only 3.5-4.5 MHz of such spectrum.¹⁶² As discussed above, in the FCC's reconsideration of the *Report and Order*, the balance of the 1.9 GHz band spectrum replaces the 800 MHz band Cellular Eligible Service Spectrum Nextel or Nextel Partners is vacating. Modification of already-existing 800 MHz band spectrum largely addresses Verizon Wireless' contention that the FCC lacks the legal authority to sell 1.9 GHz band spectrum to Nextel by a private sale outside of the competitive bidding provisions of Section 309(j). The problem, of course, is that if the Commission is selling less 1.9 GHz band spectrum, it cannot expect or ask Nextel or a Non-Nextel Control Group EA licensee to pay a considerable amount. This is particularly the case if Nextel and Nextel Partners vacate a considerable portion of their Upper 200 Channels' Spectrum in the one hundred eighteen (118) EA markets in which these licensees share General Category and Lower 80 EA-Licensed Spectrum with Non-Nextel EA licensees. As noted above, the capital expenditures to be incurred by Nextel and Nextel Partners for additional cell sites to maintain their respective operating systems' capacity should be counted toward Nextel's obligation to contribute a total of \$4.86 billion in value in exchange for its receipt of 10 MHz of 1.9 GHz Band spectrum in each of the one hundred seventy-five (175) EA markets. One of the major legal and practical problems with the Enhanced Consensus Parties' Proposal was that Nextel's promised contribution does not cover all of the reasonably anticipated 800 MHz relocation costs.

Preferred maintains that cellular licensees who benefit from reorganization of the 800 MHz Private Land Mobile Band should contribute funds to defray total 800 MHz band relocation costs. For example, cellular carriers operating in the A Frequency Block are converting the lower half of their respective spectrum from analog to digital. Such conversion necessarily will result in increased incidents of interference with Public safety and other licensees in the immediately adjacent 800 MHz Private Land Mobile Radio Band. As a result, such licensees would receive a considerable operating and financial benefit from the FCC's adoption of Preferred's Improvements. Moreover, these licensees and cellular carriers operating in the B Frequency Block have had the benefit of utilizing their respective spectrum for over twenty years without paying either for the initial issuance of their respective licenses or their several renewals. With the passage of the Omnibus Budget Reconciliation Act of 1993, which mandated that the FCC maintain regulatory parity among all CMRS licensees and the 1997 amendment to Section 309 of the Communications Act, which mandated the future allocation of commercial services spectrum by a competitive bidding procedure, Preferred contends that the FCC should now seek to impose license renewal fees on CMRS licenses previously awarded by comparative hearing or a lottery procedure.

As Preferred noted in its *Ex Parte Comment* filed on March 2, 2004, the probable realistic cost of the Consensus Parties' Proposal is approximately \$3.360 billion.¹⁶³ Given the relatively small amount of 1.9 GHz band spectrum that would be allocated

¹⁶² This problem is highlighted by Nextel's request for clarification with respect to the FCC's incorrect calculation of the value of Nextel's 800 MHz Band spectral contribution. See Nextel Communications, Inc., *Ex Parte* Presentation, September 21, 2004, at Slide 9.

¹⁶³ Preferred Communication Systems, Inc., March *Ex Parte*, at pp. 35-37 and **Exhibit K**.

under the Consensus Parties' Proposal, the WTB Draft Report and Order or Preferred Improvements outside of the movement of 800 MHz spectrum, Preferred believes that it is unrealistic to expect Nextel, Preferred and perhaps other 800 MHz General Category and Lower 80 EA licensees to pay this entire amount. Preferred therefore would suggest that the Commission consider imposing a fee of \$.15 MHz/Pop as a condition of granting a renewal of the cellular authorizations that originally were allocated pursuant to a comparative hearing, lottery procedure or full market settlement approximately twenty years ago and which have been renewed several times. Preferred estimates that such fee, which would be imposed upon the filing of each cellular license renewal application, would raise more than \$2.19 billion over the next five years.¹⁶⁴ Such monies could and arguably be used by the Commission to pay a portion of the total 800 MHz band relocation costs.

Moreover, if the FCC determines to afford adequate relocation cost funding a higher priority the providing additional 800 MHz band spectrum to Public Safety and Business and Industrial/Land Transportation licensees, it could allocate the 800 MHz band spectrum to be vacated within Channels 121-400 by a competitive public auction. Preferred estimates that an average of 4.5-4.7 MHz of 800 MHz band spectrum would be allocated in each of the one hundred seventy-five (175) EA markets. The Commission clearly would have the authority to require the winners of this auction to pay the relocation costs of the Public Safety and Business and Industrial/Land Transportation licensees presently holding spectrum within the Interleave Channels. Preferred estimates that the winners of such auction would be required to pay approximately \$686 million to relocate such Public Safety and Business and Industrial/Land Transportation licensees, or an average of \$.50 per MHz/Pop for the 800 MHz spectrum acquired in the auction.

Together with Nextel's (up to \$850 million with \$100 million secured by irrevocable letter of credit) and Preferred's (up to \$200 million) promised contributions and a renewal fee imposed upon cellular licensees, more than \$3.876 billion would become available over a five-year period to pay the total 800 MHz band relocation costs reasonably estimated at approximately \$3.360 billion.

IV. Interference Standards and Administrative Issues

A. Report and Order

¹⁶⁴ Under Sections 158 and 159 of the Communications Act, the FCC has authority to impose and collect the monies. However, the amount of application and regulatory fees are capped by statute. See *Verizon White Paper*, at p. 4. If necessary, Preferred would suggest that the Commission request that Congress amend one or more of these Sections or enact an entirely new section to empower the FCC to impose such fees as a condition of its renewing such cellular licenses and using the monies to defray a portion of the total 800 MHz band relocation costs and other purposes.

The Commission under took the following steps to minimize interference immediately with Public Safety and other non-cellular licensees' systems in the 800 MHz Band:

- (1) adopted a new, objective definition of "unacceptable interference" for purposes of this proceeding only, to determine when Public Safety and other Non-Cellular licensees are entitled to interference protection;¹⁶⁵
- (2) assigned strict responsibility for eliminating interference to the ESMR or cellular operator(s) implicated in the interference occurrence, and assigned responsibility to all involved commercial operators if unacceptable interference results from a combination of signals from multiple systems;¹⁶⁶
- (3) required ESMR and cellular licensees, on request, to notify Public Safety and Critical Infrastructure Industry ("CII") licensees prior to activating new or modified cells, and require Public Safety and CII licensees receiving such information to notify ESMR and cellular licensees of changes in system parameters.¹⁶⁷

The FCC also imposed milestones and deadlines so that the 800 MHz band relocation process would be completed within thirty-six (36) months of release of a Public Notice announcing the start date of reconfiguration in the first NPSPAC region. To ensure timely compliance, the Commission required Nextel to meet both an interim benchmark and a final benchmark. As an interim benchmark, within eighteen (18) months of release of a Public Notice announcing the start date of rebanding in the first NPSPAC region, Nextel must complete, and the Transition Administrator must certify that Nextel has completed, the relocation of Channels 1-120 for twenty (20) NPSPAC regions.¹⁶⁸ At thirty-six (36) months, Nextel must complete, and the Transition Administrator must certify, all relocation of 800 MHz incumbents required by the *Report and Order*.¹⁶⁹

B. Nextel Requests for Clarification

In its *ex parte* presentations filed in September 2004, Nextel requested clarification of the *Report and Order* of the following:

- (1) *Report and Order's* interference protection standard achievable only after realignment—spectrum interleaving necessary to achieve this protection; FCC therefore should enforce transition period interference protection standard

¹⁶⁵ See *Report and Order*, at ¶¶ 19, 102 105-106, 109-110 and 107.

¹⁶⁶ See *id.*, at ¶ 130.

¹⁶⁷ See *id.*, at ¶¶ 124-127.

¹⁶⁸ See *id.*, at ¶ 28.

¹⁶⁹ See *id.*

tailored to the interleaved spectrum environment that remains (both lower channels and NPSPAC) until rebanding completed in a Region;¹⁷⁰

- (2) *Report and Order's* eighteen (18) month relocation milestone does not apply to Nextel and Southern;¹⁷¹
- (3) milestones and deadlines for completing 800 MHz Band relocation should commence on the start date of band reconfiguration in the first NPSPAC Region;¹⁷²
- (4) Report and Order leaves rebanding sequence and details to Transition Administrator and incumbent licensees;¹⁷³
- (5) Nextel and incumbents may directly negotiate and implement relocation agreements unless either asks Transition Administrator to be intermediary;¹⁷⁴ and
- (6) refusal to negotiate or make realistic counter-offer constitutes bad faith under FCC rules;¹⁷⁵

Preferred maintains that the primary goal of the Commission should be to ensure the immediate implementation of technical standards and mitigation tactics that are designed to minimize unacceptable interference with Public Safety and CII systems in the 800 MHz Band. Preferred therefore opposes Nextel's requests for clarification that would weaken the interference protection standard the Report and Order would impose immediately and delay the commencement of the thirty-six (36) month reconfiguration milestone period.

¹⁷⁰ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 7; and Nextel Communications, Inc., Ex Parte Presentation, September 28, 2004, at pp. 1-5.

¹⁷¹ Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 4; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 4.

¹⁷² Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 3; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 4.

¹⁷³ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 5.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

CONCLUSION

The actual operation of the *Report and Order's* 800 MHz Band movement methodology in the twenty-eight (28) EA markets in which Nextel holds all of the EA-Licensed Spectrum provides the Commission a road map both as to how to reorganize the 800 MHz band and allocate the 1.9 GHz band spectrum.¹⁷⁶ Seeking to provide 1.9 GHz band spectrum exclusively to Nextel in the EA markets in which it holds no 800 MHz band spectrum or shares EA-Licensed Spectrum with Non-NCG EA licensees through a hybrid part modification of 4.5 MHz of Nextel's 800 MHz band spectrum and part private sale clearly results in a violation of the competitive bidding provisions of Section 309(j) as well as the FCC's statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition among commercial SMR operators. Given the 800 MHz band's spectrum realities, adoption of a rebanding approach that separates EA-Licensed Spectrum from its underlying Site-Licensed Spectrum, Preferred believes that such separation is probably required if the Commission is seeking contributions from Nextel and other EA licensees to defray total 800 MHz band relocation costs.¹⁷⁷ requires the FCC to adopt Preferred's Improvements.¹⁷⁸

Ignoring the 800 MHz band spectrum realities in the one hundred forty-seven (147) EA markets in which Nextel does not hold all of the EA-Licensed Spectrum and Business and Industrial/Land Transportation Channels and adopting a rebanding approach exclusively allocating 1.9 GHz band spectrum will lead to regulatory and judicial challenges and further delay in resolving the interference experienced by public safety and other licensees in the 800 MHz band. Given the importance of the interference issue, Preferred believes that the FCC should get this right the first time and not adopt an approach unlikely to withstand judicial scrutiny.

If Nextel determines that it cannot contribute funds to defray total 800 MHz band relocation costs and forego reimbursement of its own relocation costs if the FCC adopts Preferred's Improvements, Preferred would strongly recommend that the Commission pursue the alternative sources of funding set forth above to replace Nextel's promised contribution.

¹⁷⁶ Preferred believes that such separation is probably required if the Commission is seeking contributions from Nextel and other EA licensees to defray total 800 MHz band relocation costs.

¹⁷⁷ See Preferred Communication Systems, Inc., March Ex Parte, at pp. 45-51.

¹⁷⁸ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2003, at p. 5 ("Obviously, being forced to cease operations, or deploy hundreds of millions of dollars worth of added infrastructure in these markets alone was not part of a balancing of interests sought by the Consensus Parties in proposing a comprehensive realignment of the 800 MHz band. It would be impossible for Nextel to support 800 MHz realignment under these circumstances.") Of course, if Nextel were to agree to Preferred's Improvements, except in a relatively few EA markets Nextel would not vacate a considerable number of its Upper 200 Channels. It therefore would neither experience major disruption to its current operations nor considerable additional costs.

Respectfully Submitted,

Charles M. Austin,
President
Preferred Communication Systems, Inc.
400 E. Royal Lane
Suite N24
Irving, Texas 75039
(972) 869-7626
(972) 869-7625 (Fax)
precomsys@aol.com

Kent S. Foster,
President
Silver Palm Communications, Inc.
5454 Wisconsin Avenue
Suite 720
Chevy Chase, Maryland 20815
(301) 656-5858
(301) 656-5859 (Fax)
kfoster@cellularonetx.com

EXHIBIT A

CONCEPTS TO OPERATIONS, INC. REPORT

"PROFESSIONALS PUTTING GOOD IDEAS TO WORK"

**Analysis of the Relocation of
Non-Nextel SMR, BILT and Public Safety
Site Licenses in Channels 1-150 and 401-600
Under the FCC's Report and Order**

Prepared for

Preferred Communications Systems, Inc.

Irving, Texas

Prepared by

Concepts To Operations, Inc.

801 Compass Way, Suite 217
Annapolis, Maryland 21401

Voice - (410) 224-8911 - Fax (410) 224-8591

e-mail: cto@concepts2ops.com
www.concepts2ops.com

November 3, 2004

AN EQUAL OPPORTUNITY EMPLOYER

"PROFESSIONALS PUTTING GOOD IDEAS TO WORK"



November 3, 2004

Mr. Charles M. Austin
President
Preferred Communication Systems, Inc.
6311 North O'Connor Blvd.
Irving, Texas 75039

Dear Mr. Austin:

Concepts To Operations, Inc. ("CTO") has completed an analysis of the Non-Nextel SMR and BILT Site licenses in Channels 1-150, 151-400 and 401-600 in the Private Land Mobile Radio Band (806-821 MHz/851-866 MHz) ("PLMRB"). The Federal Communications Commission's ("Commission" or "FCC") recently released Report and Order in the 800 MHz Public Safety Interference proceeding¹ moves Non-Nextel SMR and BILT Site-Specific Channels presently in the General Category Channels (Channels 1-150) to the Interleave Channels (Channels 151-400) to be vacated by Nextel Communications, Inc. ("Nextel"), Nextel Partners, Inc. ("Nextel Partners") and licensees who have executed a purchase option or management agreement with Nextel (collectively, "Nextel Control Group" or "NCG") on a geographic "footprint" basis.²

The *Report and Order*'s 800 MHz rebanding movement methodology is based upon separating Public Safety and other high-site and high-power systems into the lower end of the PLMRB denominated as the "Non-Cellular Block" (806-816.9875 MHz/851-861.9875 MHz) and low-site and low-power digital systems into the upper end of the PLMRB denominated as the "Cellular Block" (817-824 MHz/862-869 MHz).³ The Commission determined to adopt this approach to minimize the intermodulation, out-of-band emissions ("OOBE") and other types interference experienced from low-site and low-power cellular systems with Public Safety and other high-site and high-power systems.⁴ Although the *Report and Order* is not entirely clear on this point, based upon its rebanding movement methodology, SMR and BILT Site licenses in Channels 401-600 apparently also would be relocated to the Interleave Channels to be vacated by the Nextel Control Group on a geographic "footprint" basis.

¹ See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order and Order, WT Docket No. 02-55, FCC 04-16 ("Report and Order").

² See *id.*, at ¶¶ 21-23, 151-153; see also ¶¶ 154-156 (Expansion Band), ¶¶ 157-158 (Guard Band), ¶¶ 159-168 (Relocating ESMR Operations in 800 MHz Band) and ¶¶ 198 (Relocation Process Within NPSPAC Region).

³ See *id.*, at ¶¶ 21-23 and 151-153.

⁴ See *id.*, at ¶¶ 21-22.

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CORPORATE OFFICES: 801 Compass Way, Suite 217, Annapolis, MD 21401-7813 • e-mail: cto@concepts2ops.com, (410) 224-8911, Fax (410) 224-8591

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“PROFESSIONALS PUTTING GOOD IDEAS TO WORK”

The *Report and Order* proposes to reserve the one hundred twenty (120) former NPSPAC Channels (822-824 MHz/866-868 MHz) exclusively to the Nextel Control Group.⁵ The FCC thus seeks to move the Non-Nextel General Category and Lower 80 EA licensees' EA- and qualifying Site-Licensed Spectrum and Cellular-Architecture System licensees' Site-Licensed Spectrum to the Upper 200 Channels (Channels 401-600) presently held by the NCG, and available to be vacated.

The purpose of the report will be for submission to the Commission in support of the Comment to be filed by Preferred Communication Systems, Inc in response to the Commission's recent *Public Notice* soliciting comments with respect to Nextel's and others' requests for clarifications to the FCC's *Report and Order* released on August 6, 2004.⁶ The report discusses the problems likely to be encountered in implementing the FCC's reorganization of the 800 MHz band into two separate Non-Cellular and Cellular Blocks. This constitutes the sole purpose of the report.

Based upon the FCC License Database as of June 30, 2004, and the assumptions set forth herein, the report concludes that in several major Economic Area ("EA") markets, the Nextel Control Group lacks sufficient MHz/Pops Equivalent and Total Spectrum to accommodate the SMR and BILT Channels in Channels 1-150 and 401-600 sought to be relocated by the Commission's *Report and Order* to the Interleave Channels (Channels 151-400) to be vacated by the NCG. In moving the Non-Nextel Site Channels within Channels 1-150 and 401-600 to the Interleave Channels on a geographic "footprint" basis, it is unclear whether the Commission and/or Nextel determined whether the Nextel Control Group's Lower 80 and BILT Site Channels possessed sufficient Total Channels and identical geographical "footprints" and population coverages to accommodate such relocation.⁷

The report also concludes that in several major EA markets the Nextel Control Group lacks the MHz/Pops Equivalent or even Total Spectrum within the Upper 200 Channels to accommodate the movement of Non-Nextel EA and Cellular-Architecture System licensees' spectrum to the new Cellular Block or ESMR portion of the band. Moreover, the report concludes that if Non-

⁵ See *id.*, at ¶ 198.

⁶ *Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding*, Public Notice, WT 02-55 (October 22, 2004) ("Public Notice").

⁷ In determining whether a SMR, BILT or public safety Site licensee is relocated to a comparable facility, the FCC determined that such facility must provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, the Commission determined that such new facilities must have (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs. See *id.*, at ¶ 201 & n. 527. The Commission further found that its rules defined "channel capacity" as the same number of channels with the same bandwidth that is currently available to the end user. See Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19112-13 ¶ 92 (1997) ("SMR Second Report and Order").

"PROFESSIONALS PUTTING GOOD IDEAS TO WORK"

Nextel SMR and BILT Site licenses in the Upper 200 Channels (Channels 401-600) are not relocated, in many EA markets the NCG lacks sufficient MHz/Pops Equivalent or Clean Spectrum to accommodate the movement of Non-Nextel EA and Cellular-Architecture System licensees' spectrum to the new Cellular Block without requiring Nextel or Nextel Partners to vacate most of their Upper 200 Channels' spectrum and thereby to lose considerable system capacity.

Finally, the report sets forth recommendations with respect to alternative relocation approaches that address the *Report and Order's* practical and mathematical infirmities.

We set forth a summary of the report's analysis and conclusions in the immediately following Executive Summary.

Sincerely,

CONCEPTS TO OPERATIONS, INC.

AN EQUAL OPPORTUNITY EMPLOYER

CORPORATE OFFICES: 801 Compass Way, Suite 217, Annapolis, MD 21401-7813 • e-mail: cto@concepts2ops.com, (410) 224-8911, Fax (410) 224-8591

Executive Summary

Introduction.

On August 6, 2004, the Federal Communications Commission ("Commission" or "FCC") released its *Report and Order* in the 800 MHz Public Safety Interference proceeding. Largely adopting the Enhanced Consensus Parties' Proposal,⁸ the Commission bifurcated the Private Land Mobile Radio Band (806-824 MHz/851-869 MHz) ("PLMRB") into two separate blocks: a (1) Non-Cellular Block (806-816.9875 MHz/851-865.9875 MHz) reserved exclusively for high-site and high-power Public Safety, BILT and SMR systems; and (2) Cellular or ESMR Block (817-824 MHz/862-869 MHz) reserved exclusively for low-site and low-power digital cellular systems.⁹ According to the FCC, such rebanding approach was based upon the Commission's premise it could "minimize that unacceptable interference in the 800 MHz band by placing similar system architectures in like spectrum and isolating dissimilar architectures from one another."¹⁰

Pursuant to such approach, the *Report and Order* would relocate the Non-Nextel Control Group SMR, BILT and Public Safety Site Licenses in the General Category Channels (Channels 1-150) to the Interleave Channels (Channels 151-400) held and to be vacated by Nextel Communications, Inc. ("Nextel"), Nextel Partners, Inc. ("Nextel Partners") and licensees who have executed a purchase option or management agreement with Nextel (collectively, "Nextel Control Group" or "NCG") on a geographic "footprint" basis.¹¹ Although not entirely clear, based upon the FCC's enunciated rationale for its determination to reorganize the 800 MHz band, it appears that the *Report and Order* would relocate Non-Nextel SMR, BILT and Public Safety licenses in the Upper 200 Channels (Channels 401-600 or 816-821 MHz/861-865 MHz) to the Interleave Channels held and to be vacated by the NCG.¹²

Moreover, the *Report and Order* would reserve the former NPSPAC Channels (822-824.9875 MHz/866-869.9875 MHz) exclusively to the Nextel Control Group's General Category EA- and Site-Licensed Spectrum.¹³ The excess General Category and Interleaved Channels' EA- and Site-Licensed Spectrum to be vacated by the NCG would be replaced by an exclusive allocation of 1.9 GHz band spectrum.¹⁴ As a result, the *Report and Order* would relocate the Non-Nextel

⁸ See Nextel Communications, Inc., Ex Parte Presentation, June 4, 2004; Nextel Communications, Inc., Ex Parte Presentation, June 7, 2004; Nextel Communications, Inc., Ex Parte Presentation, June 9, 2004; Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004.

⁹ See *Report and Order*, at ¶¶ 21-23 and 151-158.

¹⁰ See *id.*, at ¶ 22.

¹¹ See *id.*, at ¶¶ 23 and 151.

¹² See *id.*, at ¶¶ 21-23, 151-158 and 159-168.

¹³ See *id.*, at ¶¶ 198 and 306.

¹⁴ See *id.*, at ¶¶ 65-73. The Commission maintained that it had the legal authority to allocate 10 MHz in the 1.9 GHz band exclusively to Nextel and Nextel Partners largely based upon its Section 316 authority to modify already-existing licenses by relocating them to new spectrum. See *id.*, at ¶ 67. It reemphasized this point by finding that such allocation of 1.9 GHz band spectrum did not involve the issuance of initial licenses and provided "Nextel access to substitute spectrum with which it may continue the development of its services." See *id.*, at ¶¶ 69 and 73.

EA licensee's General Category and Lower 80 EA- and qualifying Site-Licensed Spectrum and other Site-Licensed Spectrum and Cellular-Architecture System licensees' qualifying Site-Licensed Spectrum into the new Cellular Block or ESMR portion of the PLMRB by moving them to the Upper 200 Channels (Channels 401-600 or 816-824 MHz/861-869 MHz) presently largely occupied by the NCG.¹⁵

Methodology.

In developing the Non-Nextel Site SMR, BILT and Public Safety Licenses' Spreadsheet attached hereto as **Schedule 1**, CTO downloaded the FCC PLMRB license database as of June 30, 2004. We included a particular license as within an EA market if its site coordinates were located within the EA market's boundaries and the license was comprised of nonduplicated frequencies within such EA market.

Based upon the *Report and Order*, we assumed that Non-Nextel Site licenses within Channels 1-150 and 401-600 would be relocated on a geographic "footprint" basis to Interleave Channels (Channels 151-400) presently held by the Nextel Control Group. Based upon the Nextel Control Group License Holdings Spreadsheet attached hereto as **Exhibit B**, we determined that the NCG holds an average of fifty-two (52) Clean Channels or 2.6 MHz in the Lower 80 Channels. The NCG holds an average of thirty-three (33) BILT Site Channels. The Nextel Control Group holds no Clean BILT Channels in any EA market.

We then determined both the average (1) actual coverage area and (2) protected service area as measured by a 22 dBu contour of the SMR, BILT and Public Safety Site Channels within Channels 1-150 and 401-600 in the top eleven (11) EA markets used by the Commission to determine Nextel's average 800 MHz spectrum holdings throughout the U.S.¹⁶ Overlaying such average coverage areas over the 2000 U.S. Census Tract, we then determined the average population covered by these licenses. Since the *Report and Order* relocates these Non-Nextel Site Channels into the Interleave Channels presently held and to be vacated by the Nextel Control Group, we then determined the average (1) actual coverage area and (2) protected service area as measured by a 22 dBu contour of the NCG's Lower 80 EA and Site and BILT Site Channels in the eleven (11) EA markets. Overlaying such average coverage areas over the 2000 U.S. Census Tract, we then determined the average population covered by these licenses. Where the NCG's Lower 80 EA authorizations were encumbered by a previously granted Site license held by a Non-Nextel licensee, we subtracted such Site license's area and population coverage from that of the Nextel Control Group's Lower 80 EA Authorization to determine its correct coverage figures.

Conclusions.

¹⁵ See *id.*, at ¶¶ 159-168.

¹⁶ See *id.*, at ¶ 318 & n. 733. For purposes of evaluating Nextel's spectrum holdings within the Interleave Channels to be vacated, the Commission analyzed Nextel's spectrum holdings within these Channels in the top fifteen (15) EA markets by population and then extrapolated Nextel's average number of Total Channels and spectrum in these EA markets for the entire U.S. and its territories. In conducting its analysis, the FCC deleted three border area EA markets—Detroit, Seattle and San Diego and the Atlanta EA market.

Relocation of SMR, BILT and Public Safety Site Licenses Within Channels 1-150.

SMR licensees hold an average of twenty-four (24) Site Channels within Channels 1-150. However, in forty-nine (49) EA markets in which 174,792,406 persons reside, such licensees hold an average of fifty-three (53) Site Channels, or 2.65 MHz. BILT licensees hold an average of fourteen (14) Site Channels, or .7 MHz, within Channels 1-150. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of thirty-three (33) Site Channels, or 2.65 MHz. Public Safety licensees hold an average of thirteen (13) Site Channels, or .65 MHz, within Channels 1-150. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of twenty-nine (29) Site Channels, or 1.45 MHz.

The Nextel Control Group holds an average of seventy-nine (79) total Lower 80 Channels, or 3.95 MHz, and fifty-two (52) Clean Lower 80 Channels, or 2.6 MHz. The NCG holds an average of thirty-three (33) total BILT Channels, or 1.65 MHz. The NCG holds no Clean BILT Channels in any EA market.

On average, SMR, BILT and Public Safety licensees' fifty-one (51) Site Channels within Channels 1-150 apparently can be relocated to the Lower 80 EA authorizations and Site Channels and the BILT Site Channels comprising an average of one hundred twelve (112) Channels, or 5.6 MHz, presently held and to be vacated by the NCG. However, the FCC requires that relocated licensees receive "comparable facilities" and defines such term as encompassing Channels with coextensive geographical and population coverage.¹⁷ Since the NCG's Site Channels within the Interleave Channels (Channels 151-400) to be vacated often have smaller geographical coverage areas or "footprints" than those of the SMR, BILT and Public Safety licensees' spectrum holdings within Channels 1-150 to be relocated, in certain of these one hundred twenty-eight (128) EA markets, the *Report and Order*'s relocation approach fails to provide these Site licensees "equivalent channel capacity" and thus "comparable facilities" as required by Commission precedent and the *Report and Order* itself.¹⁸

However, problems clearly arise in the forty-nine (49) more "heavily congested" EA markets. In these EA markets, the SMR, BILT and Public Safety licensees hold an average of one hundred fifteen (115) Channels, or 5.75 MHz. As noted above, the Nextel Control Group holds an average of one hundred twelve (112) Channels, or 5.6 MHz. As a result, in these more "heavily congested" EA markets, even before considering the problem of the "mismatching" geographical "footprints," the NCG lacks the Lower 80 EA and Site Channels and BILT Site Channels to accommodate the *Report and Order*'s relocation of SMR, BILT and Public Safety licensees' Site Channels within Channels 1-150.

¹⁷ See *SMR Second Report and Order*, at 19112-13 ¶ 92.

¹⁸ See *Report and Order*, at ¶ 201 & n. 537.

Relocation of SMR, BILT and Public Safety Site Channels Within Channels 401-600.

SMR licensees hold an average of twenty-nine (29) Site Channels within Channels 401-600. However, in forty-nine (49) EA markets in which 174,792,406 persons reside, such licensees hold an average of forty-nine (49) Site Channels. BILT licensees hold an average of two (2) Site Channels within Channels 401-600. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of four (4) Site Channels. Public safety licensees hold an average of less than one (1) Site Channel within Channels 401-600. In the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of less than one (1) Site Channel.

The relocation of SMR, BILT and Public Safety licensees' Site Channels within Channels 401-600 does not change the conclusion set forth above with respect to whether the Nextel Control Group on average holds sufficient Lower 80 EA- and Site-Licensed Spectrum and BILT Site Channels to accommodate the *Report and Order's* relocation of SMR, BILT and Public Safety licensees' Site Channels. However, with respect to the forty-nine (49) more "heavily congested" EA markets, such relocation of the SMR, BILT and Public Safety licensees' Site Channels within Channels 401-600 exacerbates the already overcrowded spectrum. With such relocation, an average of fifty-four (54) additional Site Channels would be moved into the Lower 80 EA and Site Channels and BILT Site Channels presently held and to be vacated by the NCG. Together with the relocation of SMR, BILT and Public Safety Site Channels within Channels 1-150, such relocation would result in an average excess of fifty-seven (57) Channels or 2.85 MHz of spectrum over the EA- and Site-Licensed Spectrum held by the Nextel Control Group and to be vacated in the Interleave Channels.

We also examined a "best case" scenario which assumes all of the geographic "footprints" of the Nextel Control Group's BILT Site Channels match those of the Non-Nextel SMR, BILT and Public Safety licenses within Channels 1-150 and 401-600 to be relocated under the *Report and Order*. As the Non-Nextel Site Licenses spreadsheet attached hereto as **Schedule 1** indicates, in thirty-eight (38) EA markets in which 103.18 million persons, or approximately thirty-six percent (36%) of the total U.S. population resides the NCG lacks sufficient spectrum holdings to accommodate the *Report and Order's* relocation of the Non-Nextel Site licensees.

Relocation of Non-Nextel EA and Cellular-Architecture System Licensees' Channels.

The *Report and Order* seeks to minimize the intermodulation interference experienced by Public Safety and other high-site and high-power systems from the operations of low-site and low-power digital cellular systems by separating them into two separate blocks: (1) Non-Cellular (Channels 1-440 or 806-816.9875 MHz/851-861.9875 MHz); and (2) Cellular (Channels 441-720 or 817-824 MHz/862-869 MHz).¹⁹ The *Report and Order* reserved the former NPSPAC Channels (Channels 601-720 or 822-824.9875/MHz866-868.9875 MHz) to the Nextel Control Group.²⁰ As a result, the *Report and Order* relocated the Non-Nextel EA licensees' EA- and qualifying Site-Licensed Spectrum and Cellular-Architecture System licensees' Site Channels to the Upper 200 Channels Spectrum (Channels 401-600) presently held by the NCG.

¹⁹ See *id.*, at ¶¶ 21-23 and 151-153.

²⁰ See n. 12 *infra*.

For purposes of this analyzing whether the NCG holds sufficient spectrum within the Upper 200 Channels to accommodate the relocation set forth in the *Report and Order*, we assumed that the Non-Nextel SMR, BILT and Public Safety Site licenses within Channels 401-600 would not be relocated to the Interleave Channels (Channels 151-400) held by the NCG and to be vacated.

As the Nextel Control Group Upper 200 Channels Spreadsheet attached hereto as **Schedule 3** indicates, Nextel or Nextel Partners holds an average of one hundred sixty-eight (168) Clean Upper 200 Channels throughout the U.S. However, in forty (40) "heavily congested" EA markets in which 64,288,606 persons reside, Nextel holds an average of only one hundred fifty-five (155) such Clean Channels.²¹ As noted above, the *Report and Order* relocates the Non-Nextel EA licensees' EA authorizations and qualifying Site Channels and the Cellular-Architecture System licensee' qualifying Site Channels to the Upper 200 Channels held by the Nextel Control Group on an EA market wide Clean and 1:1 basis. In the one hundred thirty-five (135) "less congested" EA markets, Nextel or Nextel Partners has sufficient spectrum within the Upper 200 Channels to accommodate the *Report and Order*'s relocation of Non-Nextel EA and qualifying Site-Licensed Spectrum.

However, in the forty (40) "heavily congested" EA markets, in which 64,288,606 persons reside, Nextel or Nextel Partners lacks sufficient spectrum to accommodate the *Report and Order*'s relocation without requiring them to vacate 120-200 channels within the Upper 200 Channels and thereby lose considerable sufficient system capacity in these EA markets.²²

²¹ For purposes of determining "heavily congested" EA markets in this context, we focused upon EA markets in which following the relocation of Non-Nextel EA- and qualifying Site-Licensed Spectrum, Nextel or Nextel Partners would hold fewer than eighty (80) channels within the Upper 200 Channels.

²² Nextel already has voiced strong opposition to vacating a considerable portion of its Upper 200 Channels spectrum to accommodate the relocation of Non-Nextel EA and Cellular-Architecture System licensees respective EA- and qualifying Site-Licensed Spectrum. See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 5 ("Obviously, being forced to cease operations, or deploy hundreds of millions of dollars worth of added infrastructure in these markets alone was not part of the balancing of interests sought by the Consensus Parties in proposing a comprehensive realignment of the 800 MHz band. It would be impossible for Nextel to support 800 MHz realignment under such circumstances.")

**Consensus Parties' Rebanding Proposal
Relocation Cost Analysis Report**

I. Introduction.

On August 6, 2004, the Commission released its *Report and Order* in the 800 MHz Public Safety Interference proceeding. Largely adopting the Enhanced Consensus Parties' Proposal as a model for reorganization of the 800 MHz Private Land Mobile Radio Band (806-824 MHz/851-869 MHz),²³ the FCC divided the PLMRB into two separate and distinct blocks: (1) Non-Cellular Block (Channels 1-440 using 25 kHz bandwidth channels²⁴ or 806.0125-816.9875 MHz/851.0125-868.9875 MHz) and (2) Cellular Block; and (2) Cellular Block (Channels 441-720 using 25 kHz bandwidth channels²⁵ or 817.0125-823.9875 MHz/862.0125-868.9875 MHz).

Under the FCC's present PLMRB licensing scheme, 26.5 MHz was Cellular Eligible Service Spectrum. Such Spectrum was comprised of the following:

1. General Category Channels (Channels 1-150 or 7.5 MHz);
2. Lower 80 Channels (Channels 201-208, 221-228, 241-248, 261-268, 281-288, 301-308, 321-328, 341-348, 361-368 and 381-388 or 4 MHz);
3. Business and Industrial Land Transportation Channels (Channels 151-158, 161-168, 171-178, 181-188, 191-198, 212-217, 232-237, 252-257, 272-277, 292-297, 312-317, 332-337, 352-357, 372-377 and 392-397 or 5 MHz); and
4. Upper 200 Channels (Channels 401-600 or 10 MHz).

Under this licensing scheme, Public Safety was allocated one hundred ninety (190) Channels, or 9.5 MHz of spectrum.

The *Report and Order* increases the allocation of PLMRB spectrum to Public Safety by thirty (30) Channels, or 1.5 MHz.²⁶ Moreover, it reserves all "White Space" created by the Nextel Control Group's vacating the Interleave Channels (Channels 151-400 or 809.7625-815.9875 MHz/854.7625-860.9875 MHz).²⁷ The FCC and Nextel estimate that on average that such vacated spectrum comprises fifty (50) Channels or 2.5 MHz. Finally, it carves out 2 MHz from the upper end of the Interleave Channels (Channels 361-400 or 815.0125-815.9875 MHz/860.0125-860.9875 MHz and Channels 401-440 or 816.0125-816.9875 MHz/861.0125-861.9875 MHz) for use by Public Safety and other Non-ESMR operators, EA and Non-Cellular-Architecture System licensees. Public Safety licensees therefore receive an average increase of up to one hundred twenty (120) Channels or 6 MHz.

²³ See n. 8 *infra*.

²⁴ Using the largely 12.5 kHz bandwidth channels for the NPSPAC Channels moving to the former General Category Channels, the Non-Cellular Block comprises Channels 1-150.

²⁵ Using the largely 12.5 kHz bandwidth channels for the NPSPAC Channels moving to the former General Category Channels, the Cellular Block comprises Channels 551-830.

²⁶ This increase occurs due to the Commission's allocating Channels 121-150 to Public Safety. Interestingly, Nextel has expressed opposition to the FCC's reservation of these thirty (30) Channels to Public Safety. See, e.g., Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Third Power Point Slide and Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 2.

²⁷ See *Report and Order*, at ¶ 23 & nn. 55-56.

The *Report and Order* squeezes the 26.5 MHz of Cellular Service Eligible Spectrum into the new Cellular Block comprising only 14 MHz, a decrease of 12.5 MHz. Moreover, it exclusively reserves the former NPSPAC Channels to the NCG.²⁸ Further, it allocates 10 MHz of 1.9 GHz band spectrum exclusively to Nextel and Nextel Partners.²⁹ As a result, the *Report and Order* relocates the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum to the remaining 8 MHz (817-821 MHz/862-865 MHz) of the Upper 200 Channels within the new Cellular Block on an EA market wide Clean 1:1 basis.³⁰

II. Methodology.

To determine the practical and mathematical viability of the *Report and Order*'s relocation of SMR, BILT and Public Safety Site licensees' spectrum within (1) Channels 1-150 and (2) the Upper 200 Channels (Channels 401-600) we initially downloaded a nationwide PLMRB database (as of June 30, 2004) from the FCC. To avoid "multiple counting" issues in determining which SMR, BILT and Public Safety Site licenses within Channels 1-150 and 401-600 were within a particular EA market, we included only Site licenses whose site coordinates were located within a particular EA market's boundaries and nonduplicated frequencies within such EA market.

Based upon the *Report and Order*, we assumed that Non-Nextel Site licenses within Channels 1-150 and 401-600 would be relocated on a geographic "footprint" basis to Interleave Channels (Channels 151-400) presently held by the Nextel Control Group. Based upon the Nextel Control Group License Holdings Spreadsheet attached hereto as **Exhibit B**, we determined that the NCG holds an average of fifty-two (52) Clean Channels or 2.6 MHz in the Lower 80 Channels. The NCG holds an average of thirty-three (33) BILT Site Channels. The Nextel Control Group holds no Clean BILT Channels in any EA market.

To determine whether the NCG holds sufficient spectrum to accommodate the *Report and Order*'s relocation of SMR, BILT and Public Safety licensees' spectrum holdings within Channels 1-150 and then within Channels 401-600, we then determined both the average (1) actual coverage area and (2) protected service area as measured by a 22 dBu contour of the SMR, BILT and Public Safety Site Channels within Channels 1-150 and 401-600 in the top eleven (11) EA markets used by the Commission to determine Nextel's average 800 MHz spectrum holdings throughout the U.S.³¹ Overlaying such average coverage areas over the 2000 U.S. Census Tract, we also determined the average population covered by these licenses. Since the *Report and Order* relocates these Non-Nextel Site Channels into the Interleave Channels presently held and to be vacated by the Nextel Control Group, we then determined the average (1) actual coverage area and (2) protected service area as measured by a 22 dBu contour of the NCG's Lower 80 EA and Site and BILT Site Channels in the eleven (11) EA markets. Overlaying such average

²⁸ See n. 6 *infra*.

²⁹ See *Report and Order*, at ¶ 325 & n. 743.

³⁰ See *id.*, at ¶¶ 162-163. To alleviate the resulting "crowding" caused by moving the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum to the Upper 200 Channels already occupied by the Nextel Control Group, the Commission adopted a *pro rata* distribution approach to resolve disputes between the relocated licensees and the NCG.

³¹ See n. 16 *infra*.

coverage areas over the 2000 U.S. Census Tract, we then determined the average population covered by these licenses. Where the NCG's Lower 80 EA authorizations were encumbered by a previously granted Site license held by a Non-Nextel licensee, we subtracted such Site license's area and population coverage from that of the Nextel Control Group's Lower 80 EA Authorization to determine its correct coverage figures.

We then compiled such database into the Non-Nextel Site SMR, BILT and Public Safety Licenses' Spreadsheet as **Schedule 1** hereto.

III. Discussion.

A. Bifurcation of 800 MHz PLMRB

1. General Movement of SMR, BILT and Public Safety Site Licenses

a. Within Channels 1-150

The *Report and Order* relocates SMR, BILT and Public Safety Site Channels within Channels 1-150 to the Interleave Channels (Channels 151-400) presently held and to be vacated by the Nextel Control Group on a geographic "footprint" basis.³² SMR licensees hold an average of twenty-four (24) Site Channels, or 1.2 MHz, within Channels 1-150. However, in forty-nine (49) EA markets in which 174,792,406 persons reside, such licensees hold an average of fifty-three (53) Site Channels, or 2.65 MHz. BILT licensees hold an average of fourteen (14) Site Channels, or .7 MHz, within Channels 1-150. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of thirty-three (33) Site Channels, or 1.65 MHz. Public safety licensees hold an average of thirteen (13) Site Channels, or .65 MHz within Channels 1-150. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of twenty-nine (29) Site Channels, or 1.45 MHz.

The Nextel Control Group holds an average of seventy-nine (79) total Lower 80 Channels and fifty-two (52) Clean Lower 80 Channels. The NCG holds an average of thirty-three (33) total BILT Channels. The NCG holds no Clean BILT Channels in any EA market.

On average, SMR, BILT and Public Safety licensees' fifty-one (51) Site Channels, or 2.55 MHz, within Channels 1-150 apparently can be relocated to the Lower 80 EA authorizations and Site Channels and the BILT Site Channels comprising an average of one hundred twelve (112) Channels, or 5.6 MHz, presently held and to be vacated by the NCG.

In determining whether SMR, BILT and Public Safety licensees are relocated to "comparable facilities" as required by previous Commission decisions,³³ the FCC requires that such licensees receive coextensive geographical and population coverage.³⁴ The problem here is that the NCG's Site Channels within the Interleave Channels (Channels 151-400) to be vacated often have smaller geographical coverage areas or "footprints" than those of the SMR, BILT and Public Safety licensees' spectrum holdings within Channels 1-150 to be relocated. As a result, in

³² See *Report and Order*, at ¶¶ 23, 151 and 198.

³³ See *SMR Second Report and Order*, at 19112-13 ¶ 92.

³⁴ See *id.*

certain of these one hundred twenty-eight (128) EA markets, the *Report and Order*'s relocation approach fails to provide these Site licensees "equivalent channel capacity" and thus "comparable facilities" as required by Commission precedent and the *Report and Order* itself.³⁵

Moreover, problems clearly arise in the forty-nine (49) more "heavily congested" EA markets. In these EA markets, the SMR, BILT and Public Safety licensees hold an average of one hundred fifteen (115) Channels, or 5.75 MHz. As noted above, the Nextel Control Group holds an average of one hundred twelve (112) Channels, or 5.6 MHz. As a result, in these more "heavily congested" EA markets, the NCG lacks the Lower 80 EA and Site Channels and BILT Site Channels to accommodate the *Report and Order*'s relocation of SMR, BILT and Public Safety licensees' Site Channels within Channels 1-150.

b. Within Upper 200 Channels (Channels 401-600)

Although the *Report and Order* is unclear on this point, based upon its central premise that separation of dissimilar system architectures will minimize, if not eliminate the intermodulation interference experienced by Public Safety and other high-site and high power systems within the 800 MHz band,³⁶ we believe that the better view is that SMR, BILT and Public Safety Site licenses within the Upper 200 Channels not held by an EA or Cellular-Architecture System licensee, or otherwise not qualifying for relocation to the new Cellular Block,³⁷ will be moved to the Interleave Channels (Channels 151-400) presently held and to be vacated by the NCG on a geographic "footprint" basis.

SMR licensees hold an average of twenty-nine (29) Site Channels within Channels 401-600. However, in forty-nine (49) EA markets in which 174,792,406 persons reside, such licensees hold an average of forty-nine (49) Site Channels, or 2.65 MHz. BILT licensees hold an average of two (2) Site Channels within Channels 401-600, or .1 MHz. However, in the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of four (4) Site Channels, or .2 MHz. Public safety licensees hold an average of less than one (1) Site Channel, or .05 MHz, within Channels 401-600. In the forty-nine (49) more "heavily congested" EA markets, such licensees hold an average of less than one (1) Site Channel, or .05 MHz.

The relocation of SMR, BILT and Public Safety licensees' Site Channels within Channels 401-600 does not change the conclusion set forth above with respect to whether the Nextel Control Group on average holds sufficient Lower 80 EA- and Site-Licensed Spectrum and BILT Site Channels to accommodate the *Report and Order*'s relocation of SMR, BILT and Public Safety licensees' Site Channels. However, with respect to the forty-nine (49) more "heavily congested" EA markets, such relocation of the SMR, BILT and Public Safety licensees' Site Channels within Channels 401-600 exacerbates the already overcrowded spectrum. With such relocation, an average of fifty-four (54) additional Site Channels, or 2.7 MHz, would be moved into the Lower 80 EA and Site Channels and BILT Site Channels presently held and to be vacated by the NCG. Together with the relocation of SMR, BILT and Public Safety Site Channels within Channels 1-150, such relocation would result in an average excess of fifty-seven

³⁵ See *Report and Order*, at ¶ 201 & n. 537.

³⁶ See *id.*, at ¶¶ 151-158.

³⁷ See *id.*, at ¶ 163.

(57) Channels or 2.85 MHz of spectrum over the EA- and Site-Licensed Spectrum held and to be relocated by the Nextel Control Group in the Interleave Channels.

We also examined a "best case" scenario which assumes all of the geographic "footprints" of the Nextel Control Group's BILT Site Channels match those of the Non-Nextel SMR, BILT and Public Safety licenses within Channels 1-150 and 401-600 to be relocated under the *Report and Order*. As the Non-Nextel Site Licenses spreadsheet attached hereto as **Schedule 1** indicates, in thirty-eight (38) EA markets in which 103.18 million persons, or approximately thirty-six percent (36%) of the total U.S. population resides the NCG lacks sufficient spectrum holdings to accommodate the *Report and Order's* relocation of the Non-Nextel Site licensees.

2. Movement of Non-Nextel EA and Cellular-Architecture System Licensees' EA- and Qualifying Site-Licensed Spectrum.

As noted above, the *Report and Order* seeks to minimize the intermodulation interference experienced by Public Safety and other high-site and high-power systems from the operations of low-site and low-power digital cellular systems by separating them into two separate blocks: (1) Non-Cellular (Channels 1-440 or 806-816.9875 MHz/851-861.9875 MHz); and (2) Cellular (Channels 441-720 or 817-824 MHz/862-869 MHz).³⁸ The *Report and Order* reserved the former NPSPAC Channels (Channels 601-720 or 822-824.9875/MHz 866-868.9875 MHz) to the Nextel Control Group.³⁹ As a result, the *Report and Order* relocated the Non-Nextel EA licensees' EA- and qualifying Site-Licensed Spectrum and Cellular-Architecture System licensees' Site Channels to the Upper 200 Channels Spectrum (Channels 401-600) presently held by the NCG.

For purposes of this analyzing whether the NCG holds sufficient spectrum within the Upper 200 Channels to accommodate the relocation set forth in the *Report and Order*, we assumed that the Non-Nextel SMR, BILT and Public Safety Site licenses within Channels 410-600 would not be relocated to the Interleave Channels (Channels 151-400) held by the NCG and to be vacated.

As the Nextel Control Group Upper 200 Channels Spreadsheet attached hereto as **Exhibit C** indicates, Nextel or Nextel Partners holds an average of one hundred sixty-eight (168) Clean Upper 200 Channels throughout the U.S. However, in forty (40) "heavily congested" EA markets, Nextel holds an average of only one hundred fifty-five (155) such Clean Channels.⁴⁰ As noted above, the *Report and Order* relocates the Non-Nextel EA licensees' EA authorizations and qualifying Site Channels and the Cellular-Architecture System licensee' qualifying Site Channels to the Upper 200 Channels held by the Nextel Control Group on an EA market wide Clean and 1:1 basis. In the one hundred thirty-five (135) "less congested" EA markets, Nextel or Nextel Partners has sufficient spectrum within the Upper 200 Channels to accommodate the *Report and Order's* relocation of Non-Nextel EA and qualifying Site-Licensed Spectrum.

³⁸ See n. 17 *infra*.

³⁹ See n. 12 *infra*.

⁴⁰ For purposes of determining "heavily congested" EA markets in this context, we focused upon EA markets in which following the relocation of Non-Nextel EA- and qualifying Site-Licensed Spectrum, Nextel or Nextel Partners would hold fewer than eighty (80) channels within the Upper 200 Channels.

However, in the forty (40) "heavily congested" EA markets, in which 64,288,606 persons reside, Nextel or Nextel Partners lacks sufficient spectrum to accommodate the *Report and Order's* relocation without requiring them to vacate 120-200 channels within the Upper 200 Channels and thereby lose considerable sufficient system capacity in these EA markets.⁴¹

B. Recommendations.

Based upon the above discussion, the *Report and Order's* relocation of SMR, BILT and Public Safety Site licensees' spectrum holdings within Channels 1-150 and the Upper 200 Channels (Channels 401-600) is practically and even mathematically flawed. Moreover, the *Report and Order's* treatment of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum appears similarly flawed, particularly if the Commission interprets the *Report and Order* to not requiring SMR, BILT and Public Safety licensees to relocate their respective Site spectrum holdings from the Upper 200 Channels. To remedy these practical and mathematical flaws, we would recommend that the FCC consider the following alternatives:

- Relocate SMR, BILT and Public Safety Site Licensees' respective spectrum holdings from Channels 1-150 to the Interleave Channels (Channels 151-400) presently held and to be vacated by the Nextel Control Group; in EA markets where the NCG lacks sufficient spectrum to accommodate such relocation, move the excess relocated Site Channels first to the Expansion Band, and then if such excess Channels remain, then to the Guard Band in a particular EA market.
- Relocate SMR, BILT and Public Safety Site Channels within the Upper 200 Channels (Channels 401-600) to the Interleaved Channels presently held and to be vacated by the Nextel Control Group; in EA markets where the NCG lacks sufficient spectrum to accommodate such relocation, move the excess relocated Site Channels first to the Expansion Band, and then if such excess Channels remain, then to the Guard Band in a particular EA market.
- Relocate the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum initially to the former NPSPAC Channels on an EA market wide Clean and 1:1 basis. If such Channels are insufficient to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' Spectrum, these licensees should be entitled to elect to move the excess of such relocated Spectrum either to (1) the 1.9 GHz band spectrum (1,910-1,915 MHz/1,990-1,995 MHz) or (2) the Upper 200 Channels (Channels 401-600) on an EA market wide Clean and 1:1 basis.

⁴¹ See n. 19 *infra*.

EXHIBIT B

COMPARISON CHANNEL MOVEMENT CHARTS

Channel Movement Charts of Consensus Parties' Proposal and The Balanced Proposal

GENERAL CATEGORY LICENSES

(CHANNELS 1-150)

GENERAL CATEGORY EA LICENSEES

EITHER HAVE CONSTRUCTED OR HAVE FIRM COMMITMENT

CURRENT USAGE			CONSENSUS PROPOSAL	CHANNEL MOVEMENT	PREFERRED IMPROVEMENTS	CHANNEL MOVEMENT
"General" D - Block (25 Ch.)	851	.0125	NPSAC IF FULL FUNDING TO PAY COST OF NPSAC RELOCATION: OTHERS WIRE RELOC. ONLY		NPSAC	
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
"General" DD - Block (25 Ch.)	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				
	"	.0125				
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
"General" DD - Block (cont.)	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				
"General" EE - Block (25 Ch.)	"	.0125				
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				

Channel Movement Charts of Consensus Parties' Proposal and The Balanced Proposal

GENERAL CATEGORY LICENSES
(CHANNELS 1-150)
GENERAL CATEGORY EA LICENSEES
EITHER HAVE CONSTRUCTED OR HAVE FIRM COMMITMENT

CURRENT USAGE			CONSENSUS PROPOSAL	CHANNEL MOVEMENT	PREFERRED IMPROVEMENTS	CHANNEL MOVEMENT
"General" EE - Block (cont.)	853	.0125	NPSAC (IF FULL FUNDING TO PAY COST OF NPSAC RELOCATION, OTHER- WISE NEXTEL ONLY)		NPSAC	
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
"General" F - Block (25 Ch.)	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				
"General" F - Block (cont.)	854	.0125			PUBLIC SAFETY ADDITIONAL 30 CHANNELS	
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
"General" FF - Block (25 Ch.)	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				

CONSENSUS PROPOSAL TOTALS:

120-150 CHANNELS + EXACT NUMBER UNCERTAIN
CHANNELS 121-150 MARKET SPECIFIC

PREFERRED IMPROVEMENTS

150

30 NEW ALLOCATION OF PUBLIC SAFETY CHANNELS

Channel Movement Charts of Consensus Parties' Proposal and The Balanced Proposal

GENERAL CATEGORY LICENSES

(CHANNELS 1-150)

GENERAL CATEGORY EA LICENSEES

HAVE NOT CONSTRUCTED AND DO NOT HAVE FIRM COMMITMENT

CURRENT USAGE			CONSENSUS PROPOSAL	CHANNEL MOVEMENT	PREFERRED IMPROVEMENTS	CHANNEL MOVEMENT
"General" D - Block (25 Ch.)	851	.0125	NPSAC OR FULL FUNDING TO PAY COST OF NPSAC RELOCATION: OTHER- WISE NEXTEL ONLY)		NPSAC	
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				
"General" DD - Block (25 Ch.)	852	.0125				
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				
"General" E - Block (25 Ch.)	852	.0125				
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
	"	.8875				
	"	.9125				
	"	.9375				
	"	.9625				
	"	.9875				

Channel Movement Charts of Consensus Parties' Proposal and The Balanced Proposal

GENERAL CATEGORY LICENSES

(CHANNELS 1-150)

GENERAL CATEGORY EA LICENSEES

HAVE NOT CONSTRUCTED AND DO NOT HAVE FIRM COMMITMENT

CURRENT USAGE			CONSENSUS PROPOSAL	CHANNEL MOVEMENT	PREFERRED IMPROVEMENTS	CHANNEL MOVEMENT
"General" EE - Block (cont.)	853	.0125	NPSAC (IF FULL FUNDING TO PAY COST OF NPSAC RELOCATION: OTHER WISE NEXTEL ONLY)		NPSAC	
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
"General" F - Block (25 Ch.)	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				
	"	.7625				
	"	.7875				
	"	.8125				
	"	.8375				
	"	.8625				
"General" F - Block (25 Ch.) (cont.)	"	.8875			PUBLIC SAFETY	
	"	.9125				
	"	.9375				
	"	.9625				
"General" F - Block	854	.0125				
	"	.0375				
	"	.0625				
	"	.0875				
	"	.1125				
	"	.1375				
	"	.1625				
	"	.1875				
	"	.2125				
	"	.2375				
	"	.2625				
	"	.2875				
	"	.3125				
	"	.3375				
	"	.3625				
	"	.3875				
	"	.4125				
	"	.4375				
	"	.4625				
	"	.4875				
	"	.5125				
	"	.5375				
	"	.5625				
	"	.5875				
	"	.6125				
	"	.6375				
	"	.6625				
	"	.6875				
	"	.7125				
	"	.7375				

CONSENSUS PROPOSAL TOTALS:

120-150 CHANNELS + EXACT NUMBER UNCERTAIN
CHANNELS 121-150 MARKET SPECIFIC

PREFERRED IMPROVEMENTS

150